In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in this case on March 9, 1967.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 8–28) and its *per curiam* opinion on rehearing (App. B, *infra*, pp. 29–33) are not yet reported. The opinion and order of the Federal Power Commission (J.A. 337–392) are reported at 32 F.P.C. 254, and its opinion and order on rehearing (J.A. 456–467) at 32 F.P.C. 1358.

JURISDICTION

The judgments of the court of appeals were entered on March 9, 1967 (App. C, *infra*, pp. 34–39). We in-

265-429—67——1

voke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e):

> * * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the

> whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission, on the basis of the applicants' allegations of emergency and without notice or hearing, issued temporary certificates of public convenience and necessity permitting producers of natural gas to sell at specified prices pending hearing and determination by the Commission of their applications for permanent certificates. Subsequently, in the proceedings on the latter applications, the Commission determined the maximum initial price at which the gas could be sold consistently with the public convenience and necessity. This price was lower than those the producers had been charging under the temporary certificates. The question presented is whether the Commission is without power to require the producers to refund any of the excess collected during the interim period.

STATEMENT

This case involves numerous sales of natural gas made by independent producers from the South Louisiana area under contracts executed during the period 1947–1962 (J.A. 353). The Commission issued certificates authorizing the sales on a temporary basis pending action on the producers' applications for permanent certificates. As contemplated by the Natural Gas Act and by the Commission's regulations, the temporary certificates were issued, without notice or opportunity for hearing, on the basis of the producers' *ex parte* representations of emergency conditions requiring that gas deliveries be commenced immediately. See Section 7(c) of the Act, 15 U.S.C. 717f(c), and Section 157.28 of the Commission's regulations, 18 C.F.R. § 157.28. The temporary certificates stated that their issuance was without prejudice to subsequent Commission action on the applications for permanent certification (*e.g.*, J.A. 125).[1]

In the orders under review here, the Commission issued permanent certificates for these sales on condition that the prices be reduced to the appropriate "in-line" level, which it found to be 18.5 cents per Mcf for gas produced from off-shore wells in the federal domain and 20 cents per Mcf for gas produced from wells subject to the taxing jurisdiction of Louisiana (J.A. 360).[2] The Commission reserved for future de-

[1] Some of the temporary certificates contained express refund conditions (*e.g.*, J.A. 152–153). As to those certificates, there is no controversy.

[2] The difference between the on-shore and off-shore price levels reflects the fact that, under their contracts with the

termination whether and to what extent refunds should be required with respect to the more than 70 sales commenced pursuant to temporary authorizations that did not contain express refund conditions (J.A. 378).[3]

The court of appeals,[4] citing its recent decision in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, held that the Commission's deferral of the refund issue was erroneous because, in the court's view (App. A, *infra*, pp. 25–26), "refunds may be ordered under § 7 [of the Natural Gas Act] only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition."[4]

REASONS FOR GRANTING THE WRIT

In the judgment that we have asked this Court to review in our petition for certiorari in No. 1133, this Term, *Federal Power Commission* v. *Sunray DX Oil Co., et al.*, the Court of Appeals for the Tenth Circuit set aside a decision of the Commission granting certi-

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pipeline purchasers, the producers are generally entitled to an allowance for partial reimbursement of the Louisiana severance tax (*e.g.*, J.A. 86–87). This conclusion was challenged in the court below by a number of producers, who seek a larger tax reimbursement, and the case has been remanded to the Commission for further consideration of this issue. We do not seek review of the court of appeals' judgment insofar as it relates to the tax reimbursement issue or the overall level of the onshore "in-line" price.

[3] The Commission has not yet acted on the reserved issues.

[4] The court affirmed the Commission's basic in-line price condition, a condition requiring a moratorium on rate increases, and two other less important conditions of certification.

ficates of public convenience and necessity insofar as the Commission had reserved the question whether, as a condition of granting the certificates, it should require the applicants to refund certain excessive amounts received during a period of temporary authorization.[5] The Court did so because it held the Commission would have no power to order refunds for the period of temporary authorization for sales made without express refund conditions. In the present case, the Tenth Circuit, relying on its *Sunray* decision, set aside a similar Commission order. The reasons warranting review are the same as those set forth in our petition in No. 1133, to which we respectfully refer this Court.[6]

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[5] The same issue is also presented in Nos. 1134, 1135, 1227, and 1290, this Term.

[6] In our petition in No. 1133, we noted the conflict between the *Sunray* decision and *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), certiorari denied *sub nom. Prado Oil & Gas Co.* v *Federal Power Commission*, 377 U.S. 963. Since that time, the Fifth Circuit, in *Continental Oil Co.* v. *Federal Power Commission*, C.A. 5, Nos. 23188 etc., May 24, 1967, decided the refund issue in direct conflict with the Tenth Circuit. We are lodging copies of the *Continental Oil* opinion with the Court.

CONCLUSION

The petition for a writ of certiorari should be held to abide the Court's final disposition of the petition in No. 1133.

Respectfully submitted.

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JUNE 1967.

APPENDIX A

United States Court of Appeals

Tenth Circuit

January Term, 1967

Nos. 7912, 7962, 8115, 8116, 8118, 8119, 8121, 8122, 8123, 8124, 8125

PAN AMERICAN PETROLEUM CORPORATION; E. COCKRELL, JR.; CONTINENTAL OIL COMPANY; FREEPORT SULPHUR COMPANY; GENERAL AMERICAN OIL COMPANY OF TEXAS; J. RAY McDERMOTT & CO., INC.; PLACID OIL COMPANY, ET AL.; SHELL OIL COMPANY; THE SUPERIOR OIL COMPANY; AND U.S. OIL OF LOUISIANA INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT; LONG ISLAND LIGHTING COMPANY; PHILADELPHIA ELECTRIC COMPANY; PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENORS

[Filed, United States Court of Appeals Tenth Circuit, Mar. 9, 1967, WILLIAM L. WHITTAKER, *Clerk*.]

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Before LEWIS, BREITENSTEIN and HILL, Circuit Judges

LEWIS, *Circuit Judge*.

These petitions by independent natural gas producers seek review under section 19(b) of the Natural Gas Act[1] of orders entered by the Federal Power

[1] 15 U.S.C. § 717r(b).

Commission establishing an "in-line" price and other conditions for permanent certificates of public convenience and necessity issued under section 7 of the Act and covering sales of gas in interstate commerce from producing areas in South Louisiana and the adjacent federal domain offshore.[2] Proceedings before the Commission encompassed some 362 separate certificate applications, two-thirds of which were settled and severed before the conclusion of hearings, for a wide variety of gas-sales contracts executed between 1945 and 1963.[3] By its orders the Commission set the "in-line" price, or maximum initial price, at 18.5 cents per Mcf, with an additional 1.5 cents per Mcf for tax reimbursement where the gas is produced within the taxing jurisdiction of Louisiana. Refunds were required, with interest, for amounts in excess of the in-line price previously collected under temporary certificates that contained express provisions for potential refund liability. All permanent certificates that issued were made subject to a moratorium on increased-rate filings above 23.55 cents per Mcf, including tax reimbursement, pending completion of the South Louisiana area rate proceeding or July 1, 1967, whichever is earlier. Finally, for those producers whose temporary certificates contained no refund conditions, the Commission reserved for further consideration the question of whether they would in fact be required to make refunds.

The petitions are before this court by virtue of the fact that Pan American Petroleum Corporation, petitioner in Nos. 7912 and 7962, has its principal place

[2] *Union Texas Petroleum et al.*, Opinions Nos. 436 and 436-A, reported at 32 F.P.C. 254 and 32 F.P.C. 952.

[3] The petitions for review by four producers have been separately considered in this court. See *Continental Oil Co.* v. *FPC* — F. 2d —, Feb. 10, 1967.

of business within the territorial bounds of this circuit and was the first producer to file for review. The other petitioners are transfers from other circuits. 28 U.S.C. § 2112(a). The four intervenors are parties of record, but upon their election not to file briefs we denied their requests to present oral arguments.

At the hearings below, several producers offered economic and geological evidence which purported to reflect an increase in production costs from those that had prevailed during prior South Louisiana certificate proceedings. The examiner rejected this evidence, the Commission sustained the examiner, and some of the petitioners here have filed motions to adduce. Action on the motions was deferred until completion of arguments on the merits of the orders. We have since held in *Sunray DX Oil Co.* v. *FPC*, — F. 2d —, Dec. 9, 1966,[4] that the standards of public convenience and necessity to be applied by the Commission in section 7 proceedings do not compel admission of such evidence. And while circumstances surrounding certificate applications may on occasion dictate consideration of cost factors, these are matters subject in the first instance to Commission expertise and discretion. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227. Here, as will be discussed, the Commission's orders are based partially upon comparisons between current prices and in-line prices previously established. Concededly, current economic and geological cost evidence could have a substantial effect upon final disposition of the applications. But for purposes of section 7, there is nothing in the record to suggest an abuse of Commission discretion in the rejection of such evidence, and accordingly, the motions to adduce will be denied. We turn then to the substantive content

[4] References hereinafter to *Sunray DX* will be to the Dec. 9, 1966 decision of this court, — F. 2d —, unless otherwise noted.

of the orders and the producers' various objections thereto.

THE IN-LINE PRICE

The origin of the in-line price concept is the landmark *CATCO* decision, *Atlantic Ref. Co.* v. *Public Service Comm'n of New York,* 360 U.S. 378, where the Supreme Court admonished the Commission to hold the line on natural gas prices pending determination of just and reasonable rates. Since *CATCO,* numerous court opinions have attempted to articulate and refine the evidentiary standards and methodology for in-line pricing. See, *e.g., United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223; *Sunray DX Oil Co.* v. *FPC,* 10 Cir., — F. 2d —, Dec. 9, 1966; *California Oil Co., Western Div.* v. *FPC,* 10 Cir., 315 F. 2d 652; *Public Service Comm'n of New York* v. *FPC,* D.C. Cir., 329 F. 2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC,* 377 U.S. 963; *United Gas Improvement Co.* v. *FPC,* 9 Cir., 283 F. 2d 817, *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.,* 365 U.S. 879. From these and other authorities, two principles have emerged which more than once have presented the Commission with delicate problems of reconciliation. The first is that the price line must reflect current conditions in the industry and the prices on which the line is based must be those under which substantial quantities of gas presently move in interstate commerce. The second is that the Commission must be suspect of all current prices that are under review in pending court or Commission proceedings or that were arrived at by methods which subsequently have been disapproved in unrelated proceedings.

It was almost impossible for the Commission to adhere fully to both of these principles in the instant proceedings. Because of the substantial number of

temporary certificates involved and the recent history of South Louisiana in-line price litigation, the majority of interstate gas volume from the area was moving under suspect prices. In a sense, current conditions in South Louisiana had to be treated as suspect. Under the circumstances, therefore, the Commission looked to the 18.5-cent price line (exclusive of tax reimbursement) that had been established in three previous South Louisiana cases,[5] and adopted the view that, absent sufficient evidence showing the contrary, the old line would be presumed to have continued. All of the three previous decisions involved sales under contracts executed in the period 1956–1959. Absent the severed dockets, the instant case involves sales under contracts executed in the period 1957–1963.

One of the important factors that the Commission had to consider was whether the amendments to its Statement of General Policy No. 61–1, 24 F.P.C. 818, might have caused a general increase in permanently certificated prices for the South Louisiana area. The Statement established twenty-three geographic rate areas and proposed guideline prices for each area. When originally issued in September 1960, it did not set guidelines for South Louisiana because of pending litigation. On October 25, 1960, however, the Commission issued its First Amendment to the Statement, 24 F.P.C. 902, which fixed the South Louisiana guideline price at 21.5 cents per Mcf

[5] These were: *United Gas Pipeline Co.*, 30 F.P.C. 329, *dismissed for lack of venue sub nom. Gulf Oil Corp.* v. *FPC*, 5 Cir., 330 F. 2d 824; *Placid Oil Co.*, 30 F.P.C. 238, *aff'd sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, *reversing* 5 Cir., 335 F. 2d 1004; and *Continental Oil Co.*, 27 F.P.C. 96 (*CATCO* on remand). None of these cases involved consolidation of dockets on a scale as great as the instant one.

exclusive of tax reimbursement. Then on October 31, 1961, the Commission issued its Fourth Amendment to the Statement, 26 F.P.C. 661, which lowered the South Louisiana guideline price to 21.25 cents per Mcf, including tax reimbursement, and set a guideline of 19.5 cents per Mcf for gas produced in the adjacent federal domain offshore. In light of these amendments, the Commission tabulated all recent permanently certificated prices[6] according to four contract periods, *viz*:

(1) Prior to January 1, 1960, which was covered by the maximum price line (18.5 cents plus 1.5 cents for tax reimbursement where applicable) established in the three previous South Louisiana in-line cases (see note 5 *supra*);

(2) From January 1, 1960 to October 25, 1960, the date of the First Amendment to Statement of General Policy No. 61–1;

(3) From October 26, 1960 to October 31, 1961 the date of the Fourth Amendment to Statement of General Policy No. 61–1; and

(4) From November 1, 1961 to the end of 1962. The Commission then compared the weighted average permanent-certificate prices with the respective weighted average temporary-certificate prices in each contract period. The only temporary certificates considered were those involved in the instant proceeding. The findings and conclusions of the Commission may be summarized as follows:

For the calendar years in the first contract period, the weighted average price, including tax reimbursement, varied from 20.8814 cents to 21.8988 cents un-

[6] Apparently all other price sources, including settlement agreements, were deemed suspect. The examiner characterized settlement agreements as being of "doubtful validity," but there was no elaboration on this point.

der permanent certificates and from 19.5573 cents to 22.2080 cents under applicable temporary certificates. Since these figures corresponded closely with the evidence on which the three prior in-line determinations were based, the Commission concluded that there was no reason to depart from the line that those cases had established.

For the second contract period, the weighted average price, including tax reimbursement, was 21.767 cents under permanent certificates and 22.76 cents under applicable temporary certificates. It was also found, however, that almost two-thirds of the permanently certificated volume for the period moved at 23.25 cents, a figure that was approved when the Commission was applying pricing standards in certificate cases which have since been disapproved by the courts. But rather than ignore altogether this unusually high price, the Commission simply observed that the weighted average price for permanently certificated sales was within the limits of the pre-1960 weighted average prices and concluded that the price line had not changed.[1]

For contracts falling in the period between issuance of the two guideline prices, the weighted average price, including tax reimbursement, was 17.148 cents under permanent certificates and 21.25 cents under applicable temporary certificates. Here, however, temporary volumes outweighed permanent volumes by almost four to one. For contracts dated after issuance of the second guideline price, or the fourth period, the weighted average price, including tax reimbursement, was 15.0194 cents under permanent certificates

[1] If we ignore the sales at 23.25 cents, as the Commission could have done under the suspect-price doctrine, the weighted average price under permanent certificates for the second contract period would be 19.32 cents, including tax reimbursement.

and 20.87 cents under temporary certificates. But here temporary volumes outweighed permanent volumes by more than nine to one and, in addition, the weighted average price for permanent certificates was quite distorted by an extremely low-priced sale at 10.75 cents. In view of the relatively few permanently certificated sales in these last two periods and the distortion caused by the one substantial low-priced sale, the Commission concluded that the marked decline in weighted average prices from those of the first two periods did not warrant a reduction of the previously established in-line price. Accordingly, the Commission ordered that for sales subject to the taxing jurisdiction of Louisiana, the price line would be held at 18.5 cents plus 1.5 cents for tax reimbursement.

No permanent certificates and only eight temporary certificates were issued for sales from the adjacent federal domain during the three periods subsequent to January 1, 1960. The weighted average prices under the temporary certificates were 21.5 cents for the second period and 19.5 cents for the third and fourth periods. The Commission concluded that these few sales were insufficient to show a change in the previous 18.5-cent price line for that offshore area.

Petitioners' threshold argument is that the findings and conclusions of the Commission are not supported by substantial evidence. To the contrary, we think the record shows commendable diligence in the presentation to the parties and to the court of the analytical approach, computation methods, and relevant data which led to the results reached. We further think that the conclusions relating to the 18.5-cent price line based upon the record findings are clearly reasonable.

Petitioners suggest that the price line has been subjectively pre-determined by reference to the three previous South Louisiana cases, and since some of the

petitioners were not parties to those other proceedings, it is contended that they have been denied procedural due process. While such an argument has merit when considered in the abstract, it here does no more than beg the question. The Commission was careful to explain that although the previously established in-line price would be presumed to continue, it would be used simply as a point of departure in analyzing the more recent price evidence. In the end, it was demonstrated that, if anything, prices had declined rather than increased since the determination of the earlier price lines. The determination made here cannot be held invalid just because it is premised in part upon a comparison of current prices with earlier prices.

Petitioners next urge that the Commission erred in failing to give greater weight to the relatively large volumes of gas moving at prices in excess of 18.5 cents. In effect, they accuse the Commission of having applied the suspect-price doctrine in such a manner that it became mathematically impossible not to freeze the results to old price lines that had no current relevancy: We note that in *Placid Oil Co.* 30 F.P.C. 283, *aff'd sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, *reversing* 5 Cir., 335 F. 2d 1004, the Commission eliminated all sales in excess of 18.5 cents even though such sales, both numerically and volumetrically, represented well over half of the interstate total. The Supreme Court held that the 18.5-cent line was supported by the record. Here, in contrast to the *Callery* case, all permanently certificated sales, those above 18.5 cents as well as those below, were reflected in the Commission's computations. And although some of the computations were distorted by two permanent certificates at 23.25 cents and one permanent certificate at 10.75 cents, it

is clear that neither the high-priced nor the low-priced sales were ignored or eliminated from consideration.

Petitioners also complain about the use of weighted averages to arrive at ceiling prices. Naturally, average prices are lower than the highest prices paid. As a matter of mathematical simplicity, however, there is nothing wrong with using weighted averages to compare one set of numbers with another. As we stated in the *Sunray DX* case, *supra,* a comparison of weighted average prices is proper so long as it is not arbitrary and capricious. We find nothing arbitrary or capricious about the procedure followed here. In *Sunray DX* the Commission concluded that the in-line price should be raised while here it concluded that it should remain unchanged. But different results cannot condemn the method used.

Petitioners' final contention aimed at the in-line price issue is that the guideline prices established by the First and Fourth Amendments to Statement of General Policy No. 61–1 should be presumed to represent in-line prices from the points of view of producers. Our position on this question has already been set out in the *Sunray DX* opinion, and a full restatement of that position here is unnecessary. Whatever reliance producers might have placed on the guideline prices, that reliance cannot be traced to any misleading statements by the Commission. Guideline prices are, and were here, issued *ex parte,* without opportunity for a hearing as required by section 7, and not subject to judicial review. *Wisconsin* v. *FPC, D.C. Cir.,* 292 F. 2d 753. It cannot be seriously contended that they represented equivalents to the in-line prices required by *CATCO* for the issuance of permanent certificates of public convenience and necessity. *Public Service Comm'n of New York*

v. *FPC*, D.C. Cir., 329 F. 2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963. We reiterate that having once established guideline prices the Commission could not totally ignore their effect on the in-line price. But here, as in *Sunray DX*, their effect was thoroughly evaluated.

In summation, we find that the Commission has approached the instant case with full appreciation for its importance to the producers as well as to the consumer. Aside from the deference we owe Commission expertise, *California* v. *FPC*, 9 Cir., 353 F. 2d 16, 23, we are satisfied that the record evidence amply supports all of the substantive conclusions pertaining to the in-line price of 18.5 cents. We reach this conclusion, as we have indicated, in reliance upon the soundness of our earlier decision in *Sunray DX*. The District of Columbia Circuit has had recent occasion to refuse acceptance of some aspects of our reasoning in *Sunray DX*, although tacitly recognizing, as did we, that evidentiary standards must of necessity not be so inflexible as to frustrate the already-complex administration of the Natural Gas Act. *Public Service Comm'n of New York* v. *FPC*, D.C. Cir., — F. 2d —, Feb. 7, 1967. We do not believe that the simple purpose of a section 7 proceeding is to protect the consumer against exploitation pending determination of a just and reasonable rate. But see *Public Service Comm'n of New York* v. *FPC*, *supra* at slip op. pp. 24–25. The general purpose of the Act is to protect the consumer, but section 7 proceedings, as well as other proceedings in the administration of the Act, must consider and attempt to obtain a balance between the interests of consumer, producer and all others whose interests fall between. The task is difficult, but experience has gradually attached more than lip-service significance to administrative expertise.

Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices have made some adjustment in view of the inescapable captured market of regulation. The establishment of guidelines is a considered administrative function. Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interests. See generally *Continental Oil Co.* v. *FPC*, 10 Cir., — F. 2d —, Feb. 10, 1967; *Skelly Oil Co.* v. *FPC*, 10 Cir., — F. 2d — (*Permian Basin*), Jan. 20, 1967. We consider each of these procedural and background incidents to have proper evidentiary significance in a section 7 proceeding to be weighed by the Commission against the impact of more probative evidence such as permanent certificates in its determination of in-line prices. The rejection of economic and geological evidence, although not necessarily unrelated to current conditions, may be required for practical reasons. See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

TAX REIMBURSEMENT

Although we affirm the Commission's conclusions that the previously established 18.5-cent price line had not changed over the four contract periods, we find no support for the rather summary treatment of the 1.5-cent additional allowance for tax reimbursement where the gas is sold subject to the taxing jurisdiction of Louisiana. In *United Gas Improvement Co.* v. *FPC*, 9 Cir., 283 F. 2d 817, 826, *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 881, it was held:

> [C]omparative tax reimbursement plans as well as comparative base rates ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion.

During most of the contract period covered by the three prior South Louisiana in-line cases, the State of Louisiana imposed a severance tax on natural gas production of 1.5 cents per Mcf. In August 1958, an additional "gathering" tax of one cent was added, but its collection was suspended on November 30 of the same year when the tax was challenged as unconstitutional.[8] In lieu thereof, on December 1, 1958, the severance tax was simply increased by one cent to 2.5 cents per Mcf. See generally *Pan American Petroleum Corp.* v. *FPC*, D.C. Cir., 322 F. 2d 999. The reimbursement in the three prior cases was of course 1.5 cents, reflecting the full amount of the state severance tax being collected on the dates of most of the applicable contracts. The same tax reimbursement was given in the instant case without even acknowledging that there had been a change in the tax itself. Under the Ninth Circuit's *U.G.I.* decision, such action, unsupported by either evidence or logic, would indicate an abuse of discretion.[9]

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[8] It was ultimately held unconstitutional by the Supreme Court of Louisiana in *Bel Oil Corp.* v. *Fontenot*, 238 La. 1002, 117 So. 2d 571.

[9] In the brief and on oral argument, counsel for the Commission stated that the Supreme Court's *Callery* decision had disposed of the problem adversely to the producers. The *Callery* opinion, however, does not mention the propriety of the tax reimbursement, probably because the issue was not even before the Court when the case was originally submitted. The producers briefed the tax-reimbursement problem, along with sev-

Not knowing what the tax reimbursement might otherwise be, we are not in a position to determine whether the difference would be "relatively insubstantial." Petitioners have supplied the court with copies of an exhibit showing contract provisions for natural gas sales in South Louisiana from 1954 to 1962. They also refer to other evidence which, they contend, dictates an tax allowance of "at least 1.99¢ and in no event less than 1.8¢ per Mcf." From the collective points of view of the producers in the area, the differences could prove to be quite substantial. These portions of the record, however, have not been certified to us and included in the Joint Appendix, and in any event, it is the Commission that must first address itself to the problem.

The price conditions ordered by the examiner were:

> (1) 18.5 cents per Mcf if the certificate relates to a sale not subject to the taxing jurisdiction of Louisiana, and (2) 20 cents per Mcf if the certificate relates to a sale subject to Louisiana tax.

And those ordered by the Commission were:

> 18.5 cents per Mcf at 15.025 psia, plus reimbursement for Louisiana severance tax, where applicable, of not more than 1.5 cents per Mcf.

Whether the Commission misconstrued the examiner's decision or was purposely emphasizing that the inline price had not changed from that previously established, the difference between the methods of treatment is important. Both conclusions were based upon comparative contract prices which included tax reimbursement. The examiner ordered a 20-cent price including tax reimbursement while the Commission ordered an 18.5-cent price excluding reimbursement. Obviously, if the unreimbursed severance tax paid by

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eral other issues, for the first time in their petition for rehearing. The petition was denied without opinion. 382 U.S. 1001.

the producers is greater than 1.5 cents, their revenue will be below the Commission-determined base price of 18.5 cents. We find nothing in the record or in the arguments of counsel to justify a reduction of the tax reimbursement allowance below contract amounts. It appears that the pre-1958 contract allowances have been summarily imposed on petitioners, and all history of changes in taxes and contract provisions have been ignored. We therefore remand this issue to the Commission for further consideration.

THE MORATORIUM

Some of the petitioners object to the imposition of a moratorium on new rate filings in excess of 23.55 cents, including tax reimbursement, until final determination of the South Louisiana area rate or July 1, 1967, whichever is earlier. They contend that this condition in their permanent certificates has no support in the record to show that it is required by public convenience and necessity. This same contention was made about an identical moratorium provision in the *Callery* case, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223. The Supreme Court there held:

> We think, contrary to the Court of Appeals, that there was ample power under § 7(e) for the Commission to attach these conditions for consumer protection during this interim period * * *.
>
> The "in-line" price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not "suspect," and the selection of 23.55 cents beyond which a price increase might trigger escalation reflects the Commission's *expertise*. 382 U.S. at 228–29. [Emphasis by the Court.]

See also *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 42–43; *FPC* v. *Hunt*, 376 U.S. 515. The rationale of these

authorities is equally applicable to the conditioning of certificates by Commission-approved take-or-pay provisions, provisions which require no separate consideration at this time. We therefore approve the Commission action on this aspect of the case.

INTEREST ON REFUNDS

The Commission's orders require payment of refunds of amounts previously collected in excess of the in-line price [10] where temporary certificates were issued subject to such refund liability. The orders require further that interest be paid at six percent per annum on excess amounts collected before March 1, 1960 and at seven percent per annum on excess amounts collected thereafter.[11] Those petitioners whose temporary certificates did not mention interest on refunds contend that there is neither an equitable basis nor legal authority for this portion of the orders. They insist that interest may commence running only from the date that their refund obligations became liquidated, and then only at a rate which is deemed compensatory. *Rodgers* v. *United States,* 332 U.S. 371; *Billings* v. *United States,* 232 U.S. 261. These arguments, however, ignore the prior case law as it specificially relates to FPC proceedings. In *Texaco, Inc.* v. *FPC,* 5 Cir., 290 F. 2d 149, 157, and *Mississippi River Fuel Corp.* v. *FPC,* D.C. Cir., 281 F. 2d 919, 927, *cert. denied* 365 U.S. 827, the courts approved orders imposing six percent interest on refunds even though the sellers had no express notice that interest might be required. And in *Callery, supra,* where a seven per-

[10] Or in excess of the price floor fixed in certain temporary certificates if the floor is higher than the in-line price.

[11] March 1, 1960 is the date of issuance of Order No. 215A, 23 FPC 474, where interest payable on refunds was increased from six to seven percent.

cent rate was imposed without notice, the Supreme Court stated simply that "the imposition of interest on refunds is not an inappropriate means of preventing unjust enrichment." 382 U.S. at 230.[12] Here too, we approve the action taken by the Commission.

REFUNDS UNDER UNCONDITIONED TEMPORARY CERTIFICATES

As in our *Sunray DX* case, petitioners vigorously object to the portion of the Commission's orders that defers for further consideration the questions of whether and to what extent refunds will be required where temporary certificates were issued without express refund conditions. And while, unlike *Sunray DX,* we are not aware of any recent Commission action directing petitioners with unconditioned temporary certificates to make refunds out of the subject sales, we are nevertheless convinced that there is sufficient aggrievement for review at this time. On the authority of the *Skelly* case, *Public Service Comm'n of New York* v. *FPC,* D.C. Cir., 329 F. 2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC,* 377 U.S. 963, the Commission has ruled that it has "both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price" even where temporary authorizations are silent as to potential refund liability. *Skelly Oil Co. et al.,* Opinion

[12] Petitioners suggest that they are being discriminated against because in five other recent opinions the Commission set the rate at only 4½ percent. The Commission explains that all of those cases involved situations where, once the amount to be refunded became liquidated, the producers were given the option of holding the fund or depositing it in an escrow account where it would be invested in short-term government obligations, both pending an order of distribution.

No. 492, June 1, 1966.[13] Many producers, in reliance upon prior assurances that all of the moneys collected under such authorizations was theirs to keep,[14] have spent or reinvested the proceeds from their sales and would be hard put to find now the substantial amounts necessary for refunds. Inasmuch as the Commission's position on the merits of the issue is firmly established, albeit in opinions not related to this case, the threat of loss to these petitioners is real and imminent, and judicial consideration of their liability need not be postponed. *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 417–21; *Sunray DX Oil Co.* v. *FPC,* 10 Cir., 351 F. 2d 395, 400; *Hinton* v. *Udall,* D.C. Cir., 364 F. 2d 676, 680.

We held in *Sunray DX* that "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance

[13] See also *Sun Oil Co., et al.*, Opinion No. 502, July 28, 1966; *Amerada Petroleum Corp., et al.*, Opinion No. 501, July 27, 1966; *Turnbull & Zoch Drilling Co., et al.*, Opinion No. 499, July 25, 1966; *H. L. Hawkins, et al.*, Opinion No. 498, July 22, 1966.

[14] See FPC Chairman Swidler's published address to the 1961 annual meeting of the American Petroleum Institute. See also 29 F.P.C. 223, 225, where in denying intervenors' motions to impose refund conditions on previously issued unconditioned temporary certificates, a unanimous Commission stated:

"[W]e would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon (the producer's) part'. *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy."

of a temporary certificate containing an express refund condition."[15] We adhere to that decision for purposes of this case and see no reason for duplication here of principles and views already discussed. We shall, however, consider one contention that has been made by the Commission and not covered in the *Sunray DX* opinion. It is that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the District of Columbia Circuit's *Skelly* decision. From then on, says the Commission, "a producer should have taken steps to protect himself in the event refunds were ordered, and if he failed to do so, he has no equity to plead which will affect his refund obligation."[16] Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certificates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that "it is entirely possible, * * * that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate." It is difficult to imagine how a case in this

[15] — F. 2d at —. The rule would not apply of course where an unconditioned temporary certificate has not become final and is overturned by a reviewing court. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229.

[16] *H. L. Hawkins, et al.*, Opinion No. 498, p. 3, July 22, 1966.

posture could have dictated immediate preparation for a turning away from years of Commission assurances[17] and from what was believed to be settled judicial interpretation.[18]

Both the Commission and the courts have repeatedly acknowledged that stability of prices is one of the great objectives of regulation under the Natural Gas Act. We have been especially mindful of this objective in our consideration of the moratoria on new rate filings and other restrictive conditions in the producers' licenses to sell gas in interstate commerce. It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created. The Commission has stated that "temporary authorizations are not and could never be a vehicle for assuring such [price] stability by the very method by which they are handled." *Skelly Oil Co., et al.*, Opinon 492, p. 4, June 1, 1966. We emphatically disagree. The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists,

[17] See note 14 *supra*.

[18] *Sunray Mid-Continental Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404, 408–10; *cf. FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case.

The motions to adduce additional evidence are denied. All cases are remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

United States Court of Appeals

Tenth Circuit

March Term, 1967

Nos. 7912, 7962, 8115, 8116, 8118, 8119, 8121, 8122, 8123, 8124, 8125

PAN AMERICAN PETROLEUM CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT; LONG ISLAND LIGHTING COMPANY, ET AL., INTERVENORS

[Filed, United States Court of Appeals, Tenth Circuit, May 22, 1967, WILLIAM L. WHITTAKER, *Clerk*.]

ON PETITIONS FOR REHEARING

[May 22, 1967]

PER CURIAM.

The Federal Power Commission and others petition for rehearing in these cases pointing out to us quite properly that our factual recitation pertaining to the tax reimbursement question contains several misstatements relating to the history of Louisiana's tax structure and the Commission's application thereof in its earlier in-line determinations and further contending, and we believe improperly, that we have totally misconceived the Commission's determination of the amount of the in-line price.

We erroneously stated in the main opinion that an initial severance tax of 1.5 cents per Mcf was increased in 1958 to 2.5 cents. Prior to 1958, the tax imposed by the State of Louisiana on natural gas production was *1.3 cents,* consisting of a 0.3-cent severance tax and a one-cent gathering tax. In August 1958, the gathering tax was increased to two cents, but when the entire gathering tax was challenged as being unconstitutional, the severance tax was simply increased on December 1, 1958 to *2.3 cents* per Mcf.

Also in the main opinion, we observed that the Commission gave the same tax reimbursement in this case that it had given in the previous in-line cases without even acknowledging that there had been a change in the tax itself. As far as the present record is concerned, this statement is accurate. But we should note that the Commission did in fact acknowledge the change in its earlier in-line decisions, all of which were made after the effective date of the tax increase. Thus, although the contracts in *Continental* (*CATCO* on remand)[1] and *Placid*[2] were negotiated and executed when the total tax was only 1.3 cents, it appears that the tax reimbursement in those cases reflected the contract allowances in effect at the time of the Commission's decision. In *Continental,* the contracts permitted a tax reimbursement of 1.5 cents which the Commission accepted as "in the public interest and required by the public convenience and necessity." 27 F.P.C. at 594. In *Placid,* the Commission looked to comparable contracts for the same dates containing two-component prices and concluded that there was no reason to provide a tax reimbursement greater than that allowed in *Continental.*[3]

[1] 27 F.P.C. 96, 27, F.P.C. 592.

[2] 30 F.P.C. 283, 30 F.P.C. 682, *aff'd sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

[3] The Commission and the intervenors advise us that footnote

The evidence shows a definite increase in contractual tax reimbursement allowances where the contracts were negotiated and executed after Louisiana increased its severance tax.[4] While we do not hold that the producers are necessarily entitled to all of this increase, in absence of a justification in the record for a tax reimbursement below prevailing contract allowances in the area we have no choice but to conclude that the imposition of the *Continental* and *Placid* allowances was arbitrary. The purpose of the remand is to give the Commission an opportunity to show that there was in fact a reasonable basis for its action in this matter.[5]

In our main opinion we pointed out that the trial examiner had recommended an in-line price of 20 cents per Mcf but that the Commission's determinative words were:

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9 of the main opinion is inaccurate where it states that the tax reimbursement question was not before the Supreme Court when *Callery* was originally submitted. But inasmuch as the Court's opinion does not mention the propriety of the tax reimbursement and accepts without comment the 1.5-cent figure, we find no merit to the argument that the decision is sufficiently broad in scope to dispose of the question as it is presented here.

[4] Contrary to the statement in the main opinion, this evidence was certified to us by the Commission. We failed to notice the certification in sifting out the mass of exhibits and other materials submitted in connection with the case.

[5] The contracts in the third in-line case, *United Gas Pipeline Co.*, 30 F.P.C. 329, were executed after the tax increase and called for a tax reimbursement of the full 2.3 cents. The Commission's opinion there is no more enlightening than the one here. It stated simply:

"In conformity with our decisions in *CATCO* [*Continental*] and *Placid* we shall permit Gulf and Tidewater to collect an additional 1.5 cents per Mcf for partial reimbursement of the Louisiana severance tax." 30 F.P.C. at 333.

> 18.5 cents per Mcf at 15.025 psia, plus reimbursement for Louisiana severance tax, where applicable, of not more than 1.5 cents per Mcf.

The Commission now argues that we misread its decision as determining an on-shore price line having two parts: an 18.5-cent base price plus 1.5 cents for tax reimbursement, and urges that the decision set, or meant to set, a total in-line price of 20 cents, including tax reimbursement. This is a complete about-face in reasoning. The Commission's entire presentation in its two opinions, in the brief,[6] and in the transcript of oral arguments before this Court was premised on the finding that the two-component price established in the three previous in-line cases had not changed over four contract periods. It was upon this premise that we accepted the Commission's findings with respect to the 18.5-cent base price. The inadequacy of the record on tax reimbursement certainly cannot be rationalized simply by turning the amount into an unknown part of a total in-line price. Indeed, a strong argument could be made supporting the desirability of a two-comonent in-line price as an exercise of the Commission's expertise in anticipation of the potential ease of determining future adjustments in view of tax changes.

The Commission also infers in its brief on rehearing that we should affirm the decision of the Commission because the allowance of 1.5 cents for tax reimbursement has ample support in the record. But to do so would require this Court to resort to reasoning not advanced nor apparently relied on by the Commission. This we cannot do even though we might subjectively think a remand to border on futility in

[6] In its original brief the Commission consistently refers to the subject price as "18.5¢ per Mcf (plus a tax reimbursement of 1.5¢ per Mcf for gas produced within the jurisdiction of Louisiana and subject to the Louisiana severance tax)."

changing the ultimate results of a case. This Court exhausts its authority when it points out an error to the Commission. *Sunray Mid-Continental Oil Co.* v. *FPC*, 353 U.S. 944.

Except to the extent that we here correct factual errors in our main opinion as specifically noted, the petitions for rehearing, including those of The Superior Oil Company and J. Ray McDermott & Company which re-argue the validity of the basic 18.5-cent price, are severally denied.

APPENDIX C

JUDGMENTS

Forty-third Day, January Term, Thursday, March 9, 1967

Before Honorable DAVID T. LEWIS, Honorable Jean S. BREITENSTEIN and Honorable DELMAS C. HILL, Circuit Judges

7912

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, ETC., RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

7962

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, ETC., RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion

to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8115

E. COCKRELL, JR., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8116

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8118

FREEPORT SULPHUR COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8119

GENERAL AMERICAN OIL COMPANY OF TEXAS, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby

denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8121

J. RAY MCDERMOTT & CO., INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8122

PLACID OIL COMPANY ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8123

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8124

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

8125

U.S. OIL OF LOUISIANA, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion to adduce additional evidence and was argued by counsel.

On consideration whereof, it is ordered by this court that the motion to adduce additional evidence is hereby denied. The case is remanded to the Commission for further proceedings consistent with the opinion of the Court.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

AUG 4 1967

JOHN F. DAVIS, CLERK

No. 227

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner*

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL, *Respondents*

RESPONDENTS' CONDITIONAL CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

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v.

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RESPONDENTS' CONDITIONAL CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

The question presented by the Federal Power Commission's petition for certiorari in this cause is closely related to the question presented by the Commission's petition for certiorari in No. 60, October Term, 1967, (originally No. 1133, October Term, 1966)[1]. The facts, though not identical, are similar. By reason of those circumstances, Respondents respectfully urge that:

(1) *If the Court determines to grant the Commission's petition in No. 60*, then certiorari should also be granted in this case in order that

[1] The "question presented" in both cases is whether the Commission may retroactively impose refund conditions on sales of gas which were made under temporary certificates issued without refund conditions. The statement of this question in the petitions for certiorari is somewhat less than candid.

the Court may have the benefit of Respondents' written and oral analysis of the threatened extension of administrative power against them. [For reasons more fully stated in the Brief in Opposition filed herein, the parties to this Motion believe certiorari should be denied in *both cases*. All action on this Motion is for that reason, expressly conditioned on the granting of certiorari in No. 60.]

(2) The two cases (Nos. 60 and 227) should be scheduled for consecutive hearings.

This specific plea that these Respondents be heard, in advance of any determination by this Court with respect to the asserted power of a federal agency to impose severely punitive orders upon these Respondents, is prompted by the Commission's apparent effort to deny us that privilege. The Commission's petition concludes (p. 7):

> "The petition for a writ of certiorari should be held to abide the Court's *final* disposition of the petition in No. 1133 [No. 60, October Term, 1967]"[2]

The substance of the treatment requested by the Commission is a command that the private parties, who successfully litigated this case below, sit silently by while their adversary argues to this Court against them, seeking an adverse adjudication of their rights in the context of another's litigation. That kind of judicially imposed default would neither be fair to the litigants nor helpful to the Court.

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[2]Emphasis supplied throughout.

THE SHOCKING IMPORT OF THE ASSERTED ADMINISTRATIVE POWER JUSTIFIES A COMPLETE PRESENTATION

We believe the power here asserted by the Federal Power Commission, if upheld through a reversal of the Court of Appeals, would undermine the very integrity of the administrative process. If there is any possibility that such a belief is well founded, then certainly this Court ought to hear from the parties affected before deciding the issue. A decision of the Supreme Court of the United States involving governmental credibility is far too vital to rest upon anything less than a presentation by all of the interested litigants.

The Commission, having authorized these Respondents to make sales of natural gas with orders and other overt public assurances that the prices charged would not be subject to *retroactive* change, now seeks the power to repudiate those orders and other assurances. Thus, for example, only four short years ago a unanimous Commission, in an unappealed from final order involving certain of the temporary certificates here in issue, held and thereby publicly acknowledged that a claim to such power would crack the foundations of administrative integrity:

> "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action * * * would so denature the value of a Commission authorization as to place any

> **reliance upon our actions in this area in serious jeopardy."[3]**

Previously, then Chairman Swidler, in his address at the 1961 Annual Meeting of the American Petroleum Institute to the leaders of the regulated industry, had also given his word that temporary certificates issued without price conditions were intended to "authorize initial sales *on a firm basis*" so that the "producers may know that all of the new initial price is theirs to keep . . ."[4]

Seeking now to renege on such unequivocal assurances, the Commission actually ridicules Respondents for their naivete in relying upon an agency of the United States Government:

> "These producers, similar to several others, could have obtained permanent certificates long ago [by waiving their right to a hearing] which would have fixed with finality their initial rates, but *they gambled on securing ratification of their higher contract prices and they lost.*"[5]

We are not alone in our conviction that nothing less is here at issue than the integrity of the administrative process. A unanimous Court of Appeals, in the decision below, expressed a similar concern:

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[3]Order Denying Motion to Impose Price Conditions in Temporary Certificates issued February 4, 1963, *In the Matters of General American Oil Company of Texas* et al, Docket Nos. CI61-182 et al, 29 FPC 223, 225.

[4]Swidler, Joseph C., Address to the Annual Meeting of the API (November 15, 1961), distributed through the Federal Power Commission's Office of Public Information.

[5]Opinion and Order Requiring Refunds issued June 1, 1966, *In the Matters of Skelly Oil Company et al,* Docket Nos. G-18638 et al, pp. 4-5.

> "* * * **we consider it unconscionable** to impose upon an unwary producer a ***hidden liability*** which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principal of imposing and enforcing a ***retroactive condition*** where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case."[6]

THE COURT'S EFFORT TO REACH A JUST DECISION WILL BE AIDED BY HEARING ARGUMENTS FROM THESE RESPONDENTS

The practice of hearing from all parties in pending cases involving similar questions is contemplated by this Court's Rule 43(5):

> "*Two or more cases*, involving the same question *may* on the court's own motion or by special permission *on* the *motion* or stipulation of the parties, *be argued* together as one case, or *on such terms as may be prescribed.*"

Our request for consecutive arguments is likewise in keeping with prior practice:

> "When different cases presenting substantially the same issue come before the Court at the same time, * * * *counsel will usually be permitted* either *to argue the cases separately, in order*, or to consolidate the arguments, so that all the petitioners precede all the respondents."[7]

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[6] *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F.2d 161, 173 (1967).

[7] Supreme Court Practice, Stern and Gressman (2nd Ed. 1954), p. 328.

Just last term, for instance, this Court granted petitions for certiorari in two cases presenting closely related questions and scheduled them for consecutive hearings.[8] The separate (but consecutive) arguments were so helpful in the Court's consideration of those cases that the decisions were subsequently handed down together. Though opposite results were reached in the two cases, the similarities and contrasts helped illuminate the way to the proper decision. This Court concluded:

> "We think they are best treated together in one opinion."[9]

Similarly the opinion of the Court of Appeals in *Sunray* (No. 60 in this Court) was not written until that Court had also heard oral argument in this case. When the *Sunray* opinion was issued, the Court expressly acknowledged its indebtedness to the oral argument in our case.[10] The Court will no doubt itself recall numerous such instances where the cumulative contribution of argument in cases presenting similar questions has been of material benefit in the proper decision of those cases.

The contribution of full and adequate oral argument to the judicial task of reaching a proper decision has often received recognition by this Court and by its

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[8]No. 150, *Associated Press v. Walker*, and No. 37, *Curtis Publishing Company v. Butts*, Order Scheduling for Consecutive Oral Arguments reported at 35 Law Week 3270.

[9]Id., Opinion issued June 12, 1967, slip ed. p. 3.

[10]*Sunray DX Oil Company v. FPC*, 370 F.2d 181, 191, Note 36 (10th Cir. 1966).

individual Justices. Rule 45(1) is an eloquent tribute to the necessity for oral submissions:

> "The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

One of this Court's leading pronouncements in recent years is the decision in *Brown v. Board of Education*, 347 U.S. 483 (1953). When that case was being presented, the State of Kansas did not propose to appear in oral argument or present a brief. This Court, recognizing the importance of hearing from all parties vitally affected by the decision to be rendered in the case, on November 24, 1952, ordered:

> "* * * we request that the State present its views at oral argument."[11]

The following June the Court assigned the case for reargument, specifying certain areas of difficulty. In that order the Court sought further help from argument of counsel:

> "The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."[12]

The Honorable Robert H. Jackson, a former Associate Justice of this Court, in his widely cited article on Advocacy Before the Supreme Court, told the American Bar:

---

[11]344 U.S. 141.

[12]345 U.S. 972-3.

> "I think that Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations."[13]

Moreover the Federal Power Commission has itself cautioned against the resolution of important issues of administrative power except in a context where "interested parties can set forth their views on the legal and policy questions presented."[14]

Nor will it suffice to imply, as the conclusion of the Commission's petition in this cause does, that the issue is so nearly similar in this case to the issue in No. 60 that the question of public importance may be decided in No. 60 without examination of the context of our litigation. On that subject this Court has written:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or mangerial."[15]

---

[13]Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 American Bar Association Journal 801 (1951).

[14]Memorandum for the Federal Power Commission, *Amicus Curiae*, filed in the United States Court of Appeals for the Fifth Circuit, No. 22272, *J. M. Huber Corporation v. William Harvey Denman* (January 1966), p. 7.

[15]*S.S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

Because the decisions of the Court of Appeals for the Tenth Circuit are correct, we believe that the petitions for certiorari in both this case and No. 60 should be denied. If however the Court determines to grant the petition in either case, then it should be granted in both. In that event counsel for Respondents in both cases will be permitted to make a maximum contribution to the Court's deliberations by scheduling hearings in the two actions consecutively.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 227

(No. 1459 October Term, 1966)

FEDERAL POWER COMMISSION,

Petitioner,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Respondents,

No. 415

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, PLACID OIL COMPANY, *ET AL.*

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS, PLACID OIL COMPANY, *ET AL.*

Placid Oil Company, Margaret Hunt Hill Trustee for Hassie Hunt Trust, H. L. Hunt and Hunt Oil Company, (hereinafter referred to as Placid, *et al,*), respondents in the captioned case, file this their Brief in Opposition and pray that the captioned Petitions for Writ of Certiorari to review

the judgment of the United States Court of Appeals for the Tenth Circuit entered on March 9, 1967, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit and its Per Curiam opinion on rehearing, are reported in 376 F. 2d 161. (App. A. pp. 8-28 and App. B, pp. 29-33 of the Federal Power Commission's Petition for Writ of Certiorari). The opinion and order of the Federal Power Commission are reported at 32 FPC 254 (J.A. 337-392), and its opinion and orders on rehearing at 32 FPC 952 (J.A. 456-467) and 32 FPC 1358 (J.A. 481-482).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions filed herein.

QUESTION PRESENTED

Whether, after a no-refund temporary certificate[1] becomes final and is no longer subject to modification by the Commission or the courts, the Commission, upon issuing a permanent certificate to replace the temporary one, can require a producer to refund a portion of the price collected during the pendency of such temporary certificate, particularly when the producers had been repeatedly assured by the Commission that no refunds would be required under temporary certificates which did not contain express refund conditions.

[1]A no-refund temporary certificate is one which does not contain any type of a refund provision.

In order to fully appreciate the question, one must keep in mind the fact that the administrative proceeding involved the following three types of temporary certificates of public convenience and necessity issued by the Federal Power Commission:

(1) Those authorizing the sales as requested without any conditions as to price reduction or refund.

(2) Those authorizing the sales on condition that the price be reduced but without any refund provision, for example, prices of 23.675¢ per Mcf were reduced to 21.25¢ per Mcf.[2]

(3) Those authorizing sales on condition that the price be reduced and that the producer agree to refund all amounts collected in excess of the price finally determined to be proper down to a floor of 20¢ per Mcf, for example, prices of 23.6¢ per Mcf were reduced to 23.25¢ per Mcf subject to refund down to the floor.[3]

[2] See letter order of October 9, 1962, (J.A. 195-196) to J. Ray McDermott and Company, Inc. which provides in part as follows:

"* * * This temporary certificate is issued subject to the following express conditions:

(1) That the total initial price therefor shall not exceed 21.25 cents per Mcf at 15.025 psia, inclusive of tax reimbursement.

(2) The above specified rate shall remain in effect until changed by Commission order in this proceeding, Docket No. C163-301."

[3] For example, see letter order of June 13, 1961, (J.A. 159-160) to Placid Oil Company which provides in part as follows:

"Temporary authority is hereby issued * * * at an initial rate of 23.25 cents per Mcf at 15.025 psia (inclusive of tax reimbursement) subject to the condition that Placid refund to Tennessee any amounts in excess of the amount resulting from the rate finally determined to be proper in Docket No. C161-1362. If the rate found to be required by the public convenience and necessity is less than 20 cents per Mcf at 15.025 psia (inclusive of tax reimbursement), Placid shall only be required to refund any amounts collected under this authorization at a rate above 20 cents per Mcf at 15.025 psia (inclusive of tax reimbursement). The above specified rate and the condition attached thereto shall remain in effect until changed by further Commission order in this proceeding, Docket No. C161-1362."

The court below upheld both the price reducing and the refund conditions of the type (3) certificates and the price reducing conditions of the type (2) certificates. Therefore, the question presented to this Court involves only the type (1) certificates which are not conditioned in any way and the type (2) certificates which have price reduction conditions but do not have refund conditions. In essence, the Federal Power Commission is asking this Court to retroactively convert the type (1) and type (2) certificates into type (3) certificates.

STATUTES INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act, 52 Stat. 821-833, as amended 15 U.S.C. 717-717w, are set forth in the Petition of the Federal Power Commission No. 227 (FPC Pet., pp. 2-3)

STATEMENT

The proceeding before the Federal Power Commission originally involved 362 separate applications for certificates of public convenience and necessity authorizing sales of natural gas by independent producers to various purchasers from the South Louisiana Area. (J.A. 353)

The producers applied for temporary authorizations to commence the sales pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) and Section 157.28 of the Commission's Regulations. Insofar as is pertinent here, the Commission, as noted above, granted a number of the temporary certificates without conditions as requested; others were granted on condition that the price be reduced to 21.25¢ per

Mcf but without imposing a refund obligation; and still others were conditioned to provide for a reduced price and in addition the refund of all amounts collected in excess of the rate finally determined to be appropriate down to a floor of 20¢ per Mcf.

The District of Columbia Court of Appeals[4] upheld the only three temporary certificates that were appealed. All of the others became final and no longer subject to retroactive modification by virtue of Section 19 of the Natural Gas Act 15 U.S.C. 717r.

The producers irrevocably[5] dedicated their gas to interstate use in reliance upon the temporary certificates. Thereafter Public Service Electric and Gas Company, Long Island Lighting Company (Petitioner herein in No. 415) and United Gas Improvement Company filed a motion to *prospectively* impose refund conditions on the sales to Transcontinental Gas Pipe Line Corporation by amending the temporary certificates previously issued. The commission categorically denied the motion stating that "Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the pulic interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them".[6] The

[4] *Public Service Commission of the State of New York v. Federal Power Commission*, 327 F. 2d 893 (CADC 1964).

[5] Once deliveries of gas are commenced in interstate commerce, the producers must obtain permission of the Federal Power Commission pursuant to Section 7(b) of the Natural Gas Act 15 USC 717f(b) before such service can be discontinued.

[6] *Area Rate Proceeding et al* Docket Number AR 61-2 *et al; Amerada Petroleum Corporation* Docket Number C160-688 *et al*, 29 FPC 223, 225, order issued Feb 5, 1963.

commission's order denying the motion requesting the imposition of refund conditions upon the temporary certificates prospectively was not appealed.

Many of the dockets were settled during the hearing process. The Commission issued permanent certificates for the remaining sales on condition that the price be reduced to 18.5¢ per Mcf for gas produced from the offshore wells located in the Federal Domain and 18.5¢ per Mcf base price plus an allowance of 1.5¢ per Mcf tax reimbursement for gas produced from wells subject to the Louisiana taxing jurisdiction. (J.A. 360)

In granting the permanent certificates, the Commission ordered refunds of all amounts collected in excess of 20.0¢ per Mcf under the type (3) temporary certificates containing express refund conditions (J.A. 363, 306-307) and further asserted the power to order at some subsequent date refunds of all or a portion of any amounts collected under the type (1) and (2) temporary certificates above the 18.5¢ per Mcf plus 1.5¢ tax allowance. (J.A. 363 & 378)

As the Commission points out in its statement (Page 4 of the Pet. for Cert. No. 227), the temporary certificates stated that their issuance was without prejudice to subsequent Commission action on the applications for permanent certification, citing J.A., Pg. 125,[1] but language identical in

[1] The temporary certificate provides as follows:

"* * * such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

substance is included in the permanent certificate[8] issued to replace the temporary certificate. Does this mean that refunds can be ordered under permanent certificates if the just and reasonable rate is later determined to be less than the certificated price?

The Court of Appeals for the Tenth Circuit upheld the Commission in its determination of the price for offshore gas and in its determination of the 18.5¢ per Mcf base price for onshore gas, but held that there was "* * * no support for the rather summary treatment of the 1.5 cent additional allowance for tax reimbursement where the gas is sold subject to the taxing jurisdiction of Louisiana." (Pet. for Cert. No. 227, App. A, Pg. 19: Affirmed on Rehearing, App. B., Pp. 29-33). The court further held that the Commission may not order refunds of amounts collected under temporary certificates unless such certificates expressly provide for a refund (Pet. for Cert. No. 227, App. A, Pg. 25-26) stating:

> "The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an un-

[8] This provision recommended by the Examiner (J.A. 307, R-19324) and adopted by the Commission in Opinion 436, ordering Paragraph (I), J.A. 379, R-20699 and made a part of the permanent certificates reads as follows:

> "* * * Such grant is without prejudice to any findings or order which has been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action in this proceeding shall not foreclose nor prejudice any further proceedings or objections by the Commission relating to the operation of any price or related provision in the gas purchase contracts here involved." (J.A. 307)

wary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists, if carried to the extreme, could expand to render a fully established Section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund." [Pet. for Cert. No. 227, App. A, Pg. 27-28]

REASONS FOR DENYING THE WRIT

For the reasons alleged to warrant review of the instant case, the Commission referred this court to a Petition for Certiorari in *Federal Power Commission v. Sunray DX Oil Company, et al.*, October Term 1966, No. 1133.

In Sunray No. 1133, the Commission alleged that the decision of the court below was clearly wrong and inconsistent with earlier decisions of this Court, that the decision presented a question of substantial importance in the administration of the Natural Gas Act, and that there was a conflict among the circuits.

Respondents submit that the decision below is clearly correct, that the question presented, even if it does involve a conflict, is not of sufficient importance to warrant granting the writ, and that a division among circuits is not a sufficient reason to grant certiorari in a case where the decision is clearly correct and where, as here, the issue has already been resolved by the Commission as to the future.

(1) The Decision Below is Clearly Correct

In holding that "refunds may be ordered under Section 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition" [Pet. for Cert. No. 227, App. A, pp. 25-26], the court merely affirmed what the Commission repeatedly stated to be the meaning, intent, and extent of the temporary certificates and precisely what all parties believed to be the only interpretation of such orders. As the General Counsel for the Commission stated,

> "The history of Commission Producer Regulations with respect to temporary authorizations clearly shows, however, that a producer in accepting the unconditioned temporary authorization such as those involved here would have had no reason to assume that they might later be required to make refunds for the period that the temporary authorizations were in effect." (Brief Pg. 29 in Case No. 17582, et al., *Public Service Commission of the State of New York v. FPC*, 329 F. 2d 242, *cert. den. sub. nom. Prado Oil and Gas v. FPC*, 377 U.S. 963)

The Chairman of the Commission in an address at the 1961 annual meeting of the American Petroleum Institute publicly advised the leaders of the industry that temporary certificates issued without price conditions were intended to "authorize initial sales *on a firm basis*" so that the "producers may know that all of the new initial price is theirs to keep * * * "[*]

[*] Swidler, Joseph C., Address to the Annual Meeting of the API (Nov. 15, 1961).

Moreover, a unanimous Commission denied a motion of certain intervenors which requested that the existing temporary certificates in twenty-four of the dockets (29 FPC 223) in this very proceeding either be replaced or amended to provide for appropriate refunds "from the date of the Commission's orders" imposing the refund obligation (29 FPC 223, 224). In describing and identifying the temporary certificates, the Commission said that "[T]he initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications" (29 FPC at Pg. 224). The Commission characterized the motion as "little more than an argument that we should unilaterally impose a new refund commitment upon the producers". The Commission then unequivocally reassured the producers that no refunds would be required by flatly stating "This we will not do", explaining that "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them." (29 FPC at Pg. 225)

In granting temporary certificates, the Commission has the authority and discretion to issue such certificates as requested or to attach whatever conditions it deems necessary to protect the consumer. That the Commission was fully aware of its power in this respect when it issued the temporary certificates is evident from its order denying

rehearing issued May 9, 1958[10] (19 FPC 663, 664-665) wherein the Commission held:

> "In the exercise of the Commission's authority under Sections 7 and 16 of the Act the attachment of conditions to orders granting temporary authorization is as proper as in the issuance of a permanent certificate. *Public Utilities Commission v. Federal Power Commission*, 205 F. 2d 116, 120; *J. M. Huber Corporation v. Federal Power Commission*, 236 F. 2d 550, 557; *Signal Oil and Gas Co. v. Federal Power Commission*, 238 F. 2d 771, Cert. den. 353 U.S. 923."

Obviously, if the Commission is free to require refunds under temporary certificates which do not contain refund conditions, non-conditioned certificates will in actuality be more onerous than expressly conditioned certificates which have the effect of limiting the amount of the refund and the imposition of express refund conditions in many certificates was a wholly meaningless act. If Petitioners prevail, the Commission could retroactively annul or amend any temporary certificate or modify any of the conditions imposed thereupon. It would even be free to withdraw the very conditions which may have induced the committal of gas to the interstate market. To impose upon an unwary natural gas company such hidden liabilities has been described by the court below as being "unconscionable", *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F. 2d 161, 173 (Pet. for Cert., No. 227 App. A, pg. 27).

The Commission's authority and obligation to protect the consuming public during the pendency of temporary cer-

[10] In Re Sunray Mid-Continent Oil Company Docket Nos. G-13298 et al involving temporary authorizations of an independent producer.

tificates was the subject of this Court's decision in *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964). There the court made clear not only the broad authority vested in the Commission in the issuance of temporary certificates under Section 7(e), but also the importance and necessity of such authority being properly exercised. Speaking through Mr. Justice Clark, the court stated:

> "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that *the condition* upon which the rate was temporarily certified *be continued unchanged until the permanent certificate is issued.* (Emphasis added.) (376 U.S. at p. 523)

This is precisely the holding of the court below. Temporary certificates with conditions, as well as those without conditions, were upheld. The court merely refused to permit the Commission to retroactively change the conditions under which the sales were authorized.

The Commission, in the exercise of its administrative discretion, may not always precisely predict the price that it will ultimately determine on permanent certificate hearing to be required by the public convenience and necessity. In some cases, the permanent certificate price may be lower while in others, as in the Permian Basin Area, it may be higher. The initial price standard established by the Commission's Policy Statement for that area was 16¢, and temporary certificates issued thereafter were conditioned to this

price. However, permanent certificates were subsequently issued authorizing the same sales at 16.5¢ per Mcf.[11] Certainly, according to Petitioner's argument, the producers in such circumstances were entitled to a modification of their temporary certificates and retroactive payment of the difference in price. To so hold is to regard the Commission's issuance of temporary certificates as an exercise in futility which is clearly inconsistent with this Court's holdings in *Hunt supra* and *Callery.*[12]

(2) The Issue Presented is Not of Sufficient Importance to Warrant Intervention by This Court.

Petitioner, Federal Power Commission, acknowledges the matter in issue can be readily resolved by the Commission itself by the "inclusion in each new temporary certificate of an express condition obligating the producer to refund any charges found to be excessive", (Page 8 of Brief in the Sunray Case No. 1133). The fact of the matter is that the Commission by Order No. 336, Docket No. R-316, issued February 9, 1967, has already provided for express refund conditions where appropriate to be included in all future temporary certificates.[13] The fact that this issue relates to a limited number of pending cases is pointed out at Pg. 11-13 of Brief in Opposition for Respondent Lamar Hunt in the Sunray Case No. 1133, October 1966 Term.

[11] In re Area Rate Proceeding Docket No. AR 61-1, 34 F.P.C. 418 (1965).

[12] For an elaboration on this point, and the applicability of *United Gas Improvement Company v. Callery Properties, Inc.*, 382 U.S. 223 (1965), we respectfully refer this Court to pp. 7-11 of Brief in Opposition for Respondent Lamar Hunt in *Federal Power Commission, et al. v. Sunray DX Oil Company, et al.*, Nos. 1133, 1134, 1135, October Term 1966.

[13] Rules of Practice and Procedure, §2.63, 18 C.F.R., §2.63.

In that case, Respondent Lamar Hunt, in reviewing the Commission's extra record work papers used to support its assertion that the identical issue might arise in some 579 other contracts[14], found that of the 567 pending temporary certificates, 91 contain specific refund conditions, and, therefore, would not be affected by the decision below. Of the remaining 476 temporaries which do not contain refund conditions, 403 were temporarily certificated at or below the applicable "in-line" price as previously determined by the Commission, and, therefore, have no potential refund liability. Thus, at best, even ignoring any special circumstances, only 73 contracts could possibly be affected or controlled by the outcome of the decision below on this issue.

Likewise, the reference to potential refunds under pending cases is speculative.

In view of the locked-in period involved, the limited duration of the "in-line" pricing procedure, and the steps taken by the Commission to preclude the issue from being raised in the future, Respondents submits that the question presented is not of sufficient importance to warrant intervention and resolution by this Court.

(3) The Conflict Among the Courts of Appeal Specified by Petitioner Does Not Merit Intervention by This Court.

As noted above, the issue as to future cases has already been resolved by the Commission, and the impact of pending cases is narrowly confined. Therefore, this is not a situa-

[14] This is the number originally referred to in Petitioners' brief as 579 contracts. The Commission, we are informed, now states that the figure should have been 476 contracts.

tion where the conflict can *only be resolved* by prompt action of this Court.

Rule 19 of this Court expressly provides that a writ of certiorari will only be granted where there are special and important reasons. The rule further provides that the reasons stated for granting the writ including conflict among courts of appeal are not controlling. It is, therefore, respectfully submitted that where, as here, it is evident from the petition for the writ and the responses thereto, that the decision below is clearly correct, that the issue has already been resolved as far as the future is concerned, and that with respect to pending cases the matter is of limited significance, there are no "special and important reasons" for granting the writ.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions for Writs of Certiorari, should be denied.

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No. 227

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OCTOBER TERM, 1967

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RESPONDENTS' CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

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November 30, 1967

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FIDELITY PRINTING COMPANY, INC., HOUSTON

No. 227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION,

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Respondents.

RESPONDENTS' CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

These Respondents have earlier filed a motion[1] wherein it was urged (i) that if the Court should grant the then pending petition of the Federal Power Commission (the "Commission") for certiorari in No. 60, October Term, 1967 (originally No. 1133, October Term, 1966), that certiorari should also then be granted in this case, and (ii) that the two cases (Nos. 60 and 227) be scheduled for consecutive oral arguments. The August 7 motion is reproduced herein as Appendix A, *infra*, to conveniently show the Court without repetition the parties thereto and the contents thereof.

---

[1] Respondents' Conditional Concurrence in Petition for Certiorari and Motion for Consecutive Oral Arguments, dated August 7, 1967, hereinafter called "August 7 motion".

The August 7 motion was filed in opposition to the Commission's request that this Court deny these Respondents the right to present written and oral analysis of the Commission's threatened extension of administrative power against them. The Commission's petition, *inter alia*, requests that (p. 7):

> "The petition for a writ of certiorari should be held to abide the Court's *final* disposition of the petition in No. 1133 [No. 60, October Term, 1967]."[2]

Subsequent events (and the inherent lack of fairness and justice in such request of the Commission) compel these Respondents to again urge the Court to allow them to be heard, rather than to be required to sit silently by while the Commission, in other litigation before this Court, argues against them and seeks an adverse adjudication of their rights in their absence.

Since the filing of such August 7 motion, this Court has, on October 9, 1967, granted petitions for certiorari in Nos. 60-62, 80 and 97, each of which involves, *inter alia*, a question similar in purported effect to that presented by the Commission's petition in this No. 227. Further, on the same day, the Court granted petitions for certiorari in Nos. 111, 143, 144 and 231, and consolidated these latter cases for hearing with Nos. 60-62, 80 and 97.

Thus far this Court has not acted upon the petition for certiorari in this No. 227.

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[2] Emphasis supplied.

THE COMMISSION SHOULD NOT BE ALLOWED TO DENY THESE RESPONDENTS THEIR DAY IN COURT

Respondents respectfully submit that by honoring the Commission's request to require these Respondents to sit idly by while their rights are argued against them by the Commission (and others) in other litigation, the Court thus countenances the denial to these Respondents of the full and fair hearing to which they are entitled. Further, by granting the Commission's request, the Court allows the Commission to choose the litigation which it desires be heard for the determination of controversial, material issues. No adversary, be it a governmental agency or a private party, is entitled to such an unfair advantage.

The gas sales here involved are made from the prolific gas producing area of Southern Louisiana, and the questions here presented with respect thereto are of vital, material concern to these Respondents, some of whom are producers that are small in size but with a large monetary stake in the outcome of this litigation. It is, of course, clear that the Commission, if it be successful in its other litigation (Nos. 60, *et al.*), will seek to have the determination made therein imposed upon these Respondents, all to their great detriment. It is submitted that simple fairness and justice require that these Respondents be allowed the right to present *their* views to this Court in an effort to protect *their rights* in *their litigation*. In the court below these Respondents successfully litigated the question presented by the Commission in No. 227, but now face the iniquitous circumstance of being denied even the opportunity of protecting their position.

CONCLUSION

These Respondents seek no more than the effective recognition of their inherent entitlement to be heard in protection of their substantive, material rights. They are entitled to no less. By reason thereof, these Respondents move the Court to grant the petition for certiorari in this No. 227 and schedule consecutive oral arguments with Nos. 60, *et al.*

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APPENDIX A

No. 227

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION,

Petitioner,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Respondents.

RESPONDENTS' CONDITIONAL CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

The question presented by the Federal Power Commission's petition for certiorari in this cause is closely related to the question presented by the Commission's petition for certiorari in No. 60, October Term, 1967, (originally No. 1133, October Term, 1966).[1] The facts, though not identical, are similar. By reason of those circumstances, Respondents respectfully urge that:

(1) *If the Court determines to grant the Commission's petition in No. 60,* then certiorari should also be granted in this case in order that the Court may have the benefit of Respondents' written and oral analysis of the threatened extension of administrative power against them. [For reasons more fully stated in the

[1] The "question presented" in both cases is whether the Commission may *retroactively* impose refund conditions on sales of gas which were made under temporary certificates issued without refund conditions. The statement of this question in the petitions for certiorari is somewhat less than candid.

Brief in Opposition filed herein, the parties to this Motion believe certiorari should be denied in *both cases*. All action on this Motion is for that reason, expressly conditioned on the granting of certiorari in No. 60.]

(2) The two cases (Nos. 60 and 227) should be scheduled for consecutive hearings.

This specific plea that these Respondents be heard, in advance of any determination by this Court with respect to the asserted power of a federal agency to impose severely punitive orders upon these Respondents, is prompted by the Commission's apparent effort to deny us that privilege. The Commission's petition concludes (p. 7):

> "The petition for a writ of certiorari should be held to abide the Court's *final* disposition of the petition in No. 1133 [No. 60, October Term, 1967]"[2]

The substance of the treatment requested by the Commission is a command that the private parties, who successfully litigated this case below, sit silently by while their adversary argues to this Court against them, seeking an adverse adjudication of their rights in the context of another's litigation. That kind of judicially imposed default would neither be fair to the litigants nor helpful to the Court.

THE SHOCKING IMPORT OF THE ASSERTED ADMINISTRATIVE POWER JUSTIFIES A COMPLETE PRESENTATION

We believe the power here asserted by the Federal Power Commission, if upheld through a reversal of the Court of Appeals, would undermine the very integrity of the admin-

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[2] Emphasis supplied throughout.

istrative process. If there is any possibility that such a belief is well founded, then certainly this Court ought to hear from the parties affected before deciding the issue. A decision of the Supreme Court of the United States involving governmental credibility is far too vital to rest upon anything less than a presentation by all of the interested litigants.

The Commission, having authorized these Respondents to make sales of natural gas with orders and other overt public assurances that the prices charged would not be subject to *retroactive* change, now seeks the power to repudiate those orders and other assurances. Thus, for example, only four short years ago a unanimous Commission, in an unappealed from final order involving certain of the temporary certificates here in issue, held and thereby publicly acknowledged that a claim to such power would crack the foundations of administrative integrity:

> "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. **Such a course of action * * * would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy."**[3]

Previously, then Chairman Swidler, in his address at the 1961 Annual Meeting of the American Petroleum Institute to the leaders of the regulated industry, had also given his word that temporary certificates issued without price conditions were intended to "authorize initial sales *on a firm*

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[3] Order Denying Motion to Impose Price Conditions in Temporary Certificates issued February 4, 1963, *In the Matters of General American Oil Company of Texas* et al, Docket Nos. CI61-182 et al, 29 FPC 223, 225.

basis" so that the "producers may know that all of the new initial price is theirs to keep . . ."[4]

Seeking now to renege on such unequivocal assurances, the Commission actually ridicules Respondents for their naivete in relying upon an agency of the United States Government:

> "These producers, similar to several others, could have obtained permanent certificates long ago [by waiving their right to a hearing] which would have fixed with finality their initial rates, but *they gambled on securing ratification of their higher contract prices and they lost.*"[5]

We are not alone in our conviction that nothing less is here at issue than the integrity of the administrative process. A unanimous Court of Appeals, in the decision below, expressed a similar concern:

> "* * * **we consider it unconscionable** to impose upon an unwary producer a *hidden liability* which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principal of imposing and enforcing a *retroactive condition* where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case."[6]

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[4] Swidler, Joseph C., Address to the Annual Meeting of the API (November 15, 1961), distributed through the Federal Power Commission's Office of Public Information.

[5] Opinion and Order Requiring Refunds issued June 1, 1966, *In the Matters of Skelly Oil Company et al,* Docket Nos. G-18638 et al, pp. 4-5.

[6] *Pan American Petroleum Corp.* v. *Federal Power Commission,* 376 F.2d 161, 173 (1967).

THE COURT'S EFFORT TO REACH A JUST DECISION WILL BE AIDED BY HEARING ARGUMENTS FROM THESE RESPONDENTS

The practice of hearing from all parties in pending cases involving similar questions is contemplated by this Court's Rule 43(5):

> "*Two or more cases,* involving the same question *may* on the court's own motion or by special permission *on* the *motion* or stipulation of the parties, *be argued* together as one case, or *on such terms as may be prescribed.*"

Our request for consecutive arguments is likewise in keeping with prior practice:

> "When different cases presenting substantially the same issue come before the Court at the same time, * * * *counsel will usually be permitted* either *to argue the cases separately, in order,* or to consolidate the arguments, so that all the petitioners precede all the respondents."[7]

Just last term, for instance, this Court granted petitions for certiorari in two cases presenting closely related questions and scheduled them for consecutive hearings.[8] The separate (but consecutive) arguments were so helpful in the Court's consideration of those cases that the decisions were subsequently handed down together. Though opposite results were reached in the two cases, the similarities and

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[7] Supreme Court Practice, Stern and Gressman (2nd Ed. 1954), p. 328.

[8] No. 150, *Associated Press* v. *Walker,* and No. 37, *Curtis Publishing Company* v. *Butts,* Order Scheduling for Consecutive Oral Arguments reported at 35 Law Week 3270.

contrasts helped illuminate the way to the proper decision. This Court concluded:

> "We think they are best treated together in one opinion."[9]

Similarly the opinion of the Court of Appeals in *Sunray* (No. 60 in this Court) was not written until that Court had also heard oral argument in this case. When the *Sunray* opinion was issued, the Court expressly acknowledged its indebtedness to the oral argument in our case.[10] The Court will no doubt itself recall numerous such instances where the cumulative contribution of argument in cases presenting similar questions has been of material benefit in the proper decision of those cases.

The contribution of full and adequate oral argument to the judicial task of reaching a proper decision has often received recognition by this Court and by its individual Justices. Rule 45(1) is an eloquent tribute to the necessity for oral submissions:

> "The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

One of this Court's leading pronouncements in recent years is the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1953). When that case was being presented, the State of Kansas did not propose to appear in oral argument or present a brief. This Court, recognizing the importance of hearing from all parties vitally affected by the decision to be rendered in the case, on November 24, 1952, ordered:

> "* * * we request that the State present its views at oral argument."[11]

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[9] Id., Opinion issued June 12, 1967, slip ed. p. 3.

[10] *Sunray DX Oil Company* v. *FPC*, 370 F.2d 181, 191, Note 36 (10th Cir. 1966).

[11] 344 U.S. 141.

The following June the Court assigned the case for reargument, specifying certain areas of difficulty. In that order the Court sought further help from argument of counsel:

> "The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."[12]

The Honorable Robert H. Jackson, a former Associate Justice of this Court, in his widely cited article on Advocacy Before the Supreme Court, told the American Bar:

> "I think that Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations."[13]

Moreover the Federal Power Commission has itself cautioned against the resolution of important issues of administrative power except in a context where "interested parties can set forth their views on the legal and policy questions presented."[14]

Nor will it suffice to imply, as the conclusion of the Commission's petition in this cause does, that the issue is so nearly similar in this case to the issue in No. 60 that the question of public importance may be decided in No. 60 without examination of the context of our litigation. On that subject this Court has written:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the

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[12] 345 U.S. 972-3.

[13] Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 American Bar Association Journal 801 (1951).

[14] Memorandum for the Federal Power Commission, *Amicus Curiae*, filed in the United States Court of Appeals for the Fifth Circuit, No. 22272, *J. M. Huber Corporation* v. *William Harvey Denman* (January 1966), p. 7.

Courts of Appeals is judicial, not simply administrative or managerial."[15]

[15] *S.S. Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

Because the decisions of the Court of Appeals for the Tenth Circuit are correct, we believe that the petitions for certiorari in both this case and No. 60 should be denied. If however the Court determines to grant the petition in either case, then it should be granted in both. In that event counsel for Respondents in both cases will be permitted to make a maximum contribution to the Court's deliberations by scheduling hearings in the two actions consecutively.

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No. 415

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v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on March 9, 1967 in *Pan American Petroleum Corporation, et al.* v. *Federal Power Commission, et al.*, Tenth Cir. No. 7912, *et al.*

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. 8-28)[1] is reported at 376 F.2d 161, and its opinion denying

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[1] "FPC Pet." refers to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. 227, This Term (originally No. 1459, O.T. 1966).

rehearing, entered May 22, 1967 (FPC Pet. 29-33), is reported at 376 F.2d 173. The opinion and order of the Federal Power Commission are reported at 32 FPC 254.

JURISDICTION

The judgments of the court of appeals (FPC Pet. 34-39) were entered on March 9, 1967, and rehearing was denied by the court of appeals on May 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Where the Federal Power Commission, having issued an *ex parte* temporary certificate to a producer pending hearing and disposition of the producer's application for a certificate of public convenience and necessity, determines after the statutorily required hearing on the application that the price collected pursuant to the temporary certificate was out of line and not consistent with the public convenience and necessity, does the Commission have the power to require the producer to refund the excess amounts collected under the temporary certificate?[2]

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[2] In addition to reversing the Commission on the refund question, the court of appeals remanded the case to the Commission "to give the Commission an opportunity to show that there was in fact a reasonable basis for its action" in fixing the certificating level for sales subject to the Louisiana severance tax at a level 1.5¢ per Mcf higher than for sales not subject to such tax. Accordingly, while we believe the court below was in error (and the Commission's original opinion was correct) on the tax issue, we do not believe that, at this stage, the issue is ripe for disposition by this Court. We reserve, however, our right to challenge the court of appeals' error at some later point in this proceeding should the occasion warrant, *Mercer* v. *Theriot*, 377 U.S. 152 at 153-154 (1964).

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out at pages 2-3 of the FPC Petition.

STATEMENT

Petitioners adopt the Statement set forth at pages 4-5 of the FPC Petition.

Supplementing that Statement, petitioners would note that they were intervenors in the FPC proceedings out of which the present case grew; that before the FPC they urged that the producers be required to refund all amounts in excess of the in-line level which had been collected under temporary certification; and that, on appeal by the producers to the Tenth Circuit, petitioners each intervened in support of the Commission's order.

REASONS FOR GRANTING THE WRIT

Three months before its decision in the instant case, the Tenth Circuit had held, in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181, that the Commission lacked power to order refunds of excess amounts collected under temporary certificates in the absence of an express refund condition in the temporary certificate. Petitions, filed by the instant petitioners,[3] the FPC,[4] and others,[5] for a writ of certiorari to review the *Sunray* judgment are presently before this Court.

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[3] *Brooklyn Union Gas Co., et al.* v. *F.P.C., et al.*, No. 62, This Term (originally No. 1135, O.T. 1966).

[4] *F.P.C.* v. *Sunray DX Oil Co.*, No. 60, This Term.

[5] *United Gas Improvement Co.* v. *Sunray DX Oil Co.*, No. 61, This Term; *Texaco Inc.* v. *F.P.C.*, No. 82, This Term.

In the instant case, the court below purported to do no more on the refund issue than follow its own *Sunray* precedent. It therefore follows that if *Sunray* was incorrect and warrants the issuance of a writ of certiorari, then a writ of certiorari is also required in the instant case. Accordingly, we would respectfully refer the Court to pages 17-23 of our petition in *Sunray—Brooklyn Union Gas Co., et al.* v. *F.P.C., et al.*, No. 62, O.T. 1967.[6]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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July 24, 1967

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[6] We would also note, as has the FPC (Pet. p. 6 n. 6), that subsequent to the filing of the petitions for certiorari in *Sunray*, the Fifth Circuit decided the refund issue in conflict with the Tenth Circuit, *Continental Oil Co.* v. *F.P.C.*, Fifth Cir. No. 23188 *et al.*, May 24, 1967.

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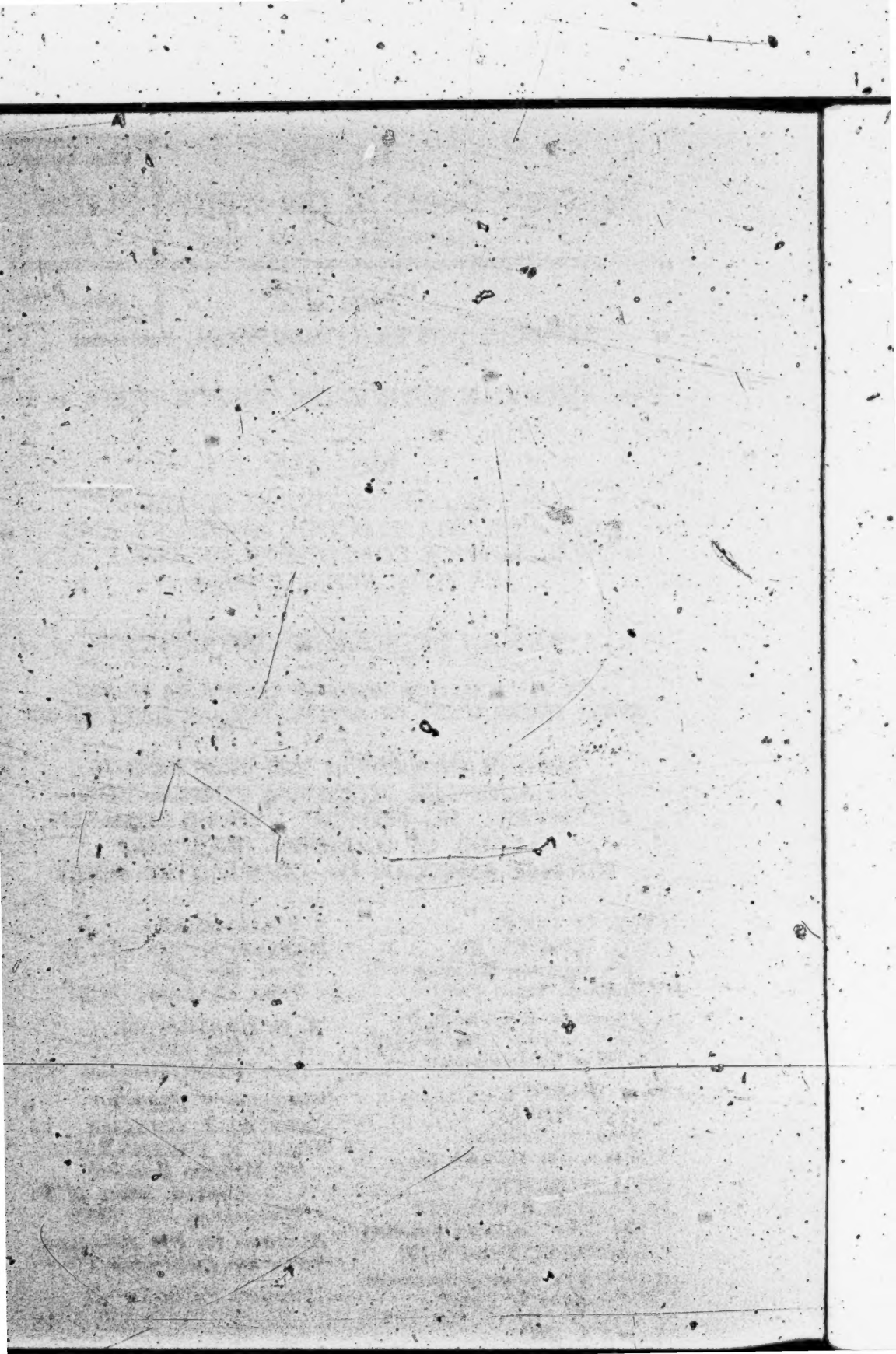

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OPINIONS BELOW

The opinion of the Court of Appeals and its *per curiam* opinion on rehearing are reported at 376 F. 2d 161 and at 376 F. 2d 173; these opinion are reprinted as Appendices A and B, respectively, to the Petition filed by the Solicitor General on behalf of the Federal Power Commission (Commission) in No. 227, October Term, 1967. The opinion and order of the Commission is reported at 32 FPC 254 (J. A. 337-392), and its opinion and order on rehearing at 32 FPC 1358 (J. A. 456-467).

JURISDICTION

The jurisdictional grounds are adequately set out in the Petitions for Writ of Certiorari.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, June 21, 1938, C. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set forth in Appendix B, *infra*.

QUESTIONS PRESENTED

1. May the Federal Power Commission lawfully order the refund of sums collected under a temporary certificate of public convenience and necessity issued earlier by the same agency, but without any refund condition or other notice of contingent refund liability?

2. A motion was filed with the Federal Power Commission to impose refund conditions on "no refund condition" temporary certificates of public convenience and necessity. The Commission denied this motion and held that receipts under the temporary certificates were firm and not subject to refund. May the Commission now order the refund of such receipts in contravention of its earlier holding?

STATEMENT

Respondents filed separate applications for permanent certificates of public convenience and necessity pursuant to Section

7 of the Natural Gas Act, 15 U.S.C. 717f. These applications proposed sales of natural gas produced in Southern Louisiana or in the adjacent Federal offshore area to various interstate pipeline companies pursuant to individual contracts.

Pending action upon the applications for permanent certificates, the Commission granted, by separate orders, temporary certificates of public convenience and necessity to each Respondent authorizing it to make each of the proposed sales at or below the initial contract price proposed. The temporary certificates were issued by the Commission without any refund condition or other notice of contingent refund liability[1] (see, *e.g.*, J. A. 124).

Except in an instance where temporary certificates were *upheld* on appeal to the District of Columbia Court of Appeals,[2] no judicial review was instituted of the separate temporary certificate orders[3] issued without notice of refund liability.

In reliance upon the temporary certificates issued them,

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[1] Certain temporary certificates not placed in issue by the Petitions for Certiorari specifically stated that amounts collected thereunder would be subject to possible refund (see, *e.g.*, J.A. 165). These latter "refund condition" temporaries should be distinguished from the "no refund condition" temporaries presently before the court.

[2] *Public Service Commission v. Federal Power Commission*, 327 F. 2d 893 (CADC, 1964). The general power of the Commission to issue temporary certificates to producers was sustained by the court. There was no contention made in this case, however, that refund conditions should be inserted in the specific temporary certificates before the court.

[3] Temporary certificate orders are final orders which must be judicially reviewed, if at all, within the time specified in Section 19(b) of the Natural Gas Act. *Texaco Inc. v. Federal Power Commission*, cited *infra*.

Repsondents commenced deliveries or natural gas in interstate commerce.[4]

Thereafter, Public Service Electric and Gas Company, Long Island Lighting Company (a Petitioner herein) and United Gas Improvement Company filed a joint motion to impose refund conditions on temporary certificates granted Respondents without refund condition.[5] The Commission denied the motion, holding that receipts under the temporary certificates were firm and not subject to refund obligation.[6]

Judicial review was not sought of the order denying the imposition of refund conditions upon the temporary certificates.

After consolidation of the separate applications for permanent certificates, a hearing was had upon these applications and, following the tentative opinion of the hearing examiner, the Commission issued permanent certificates of public convenience and necessity to Respondents (J. A. 337).

In connection with the issuance of permanent certificates, the Commission held *inter alia* that it posses the power to order

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[4] Once having commenced deliveries in interstate commerce, the producer may not cease deliveries of gas without the permission of the Commission. Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b). See Note 10 herein.

[5] At issue were temporary certificates granted to producers to authorize sales of natural gas to Transcontinental Gas Pipe Line Corporation. Among the temporary certificates involved were temporary certificates issued to Respondents Pan American Petroleum Corporation (Docket No. G-16946), U.S. Oil of Louisiana Inc. (Docket No. C161-144), and General American Oil Company of Texas (Docket No. C161-182).

[6] This order of the Commission appears at 29 FPC 223 and is set out as Appendix A to this brief, *infra*.

the refund of sums collected under temporary certificates without refund conditions (J. A. 363-364). However, the Commission temporarily deferred the exercise of this claimed power, which it would assert as a "condition" to the permanent certificates therewith issued (J. A. 378).

The Court of Appeals reversed the Commission on the issue of refunds, and held that the Commission may not lawfully order the refund of sums collected under temporary certificates issued without notice of refund obligation (FPC Pet., App. A, pp-24-28). The Court cited with approval its decision in *Sunray DX Oil Co. v. Federal Power Commission*, 370 F. 2d 181 (CA 10, 1966), and repeated that the Commission may order refunds under Section 7 of the Natural Gas Act "only when a producer contractually agrees to make such refunds by the acceptance of a temporary certificate containing an express refund condition" (FPC Pet., App. A, pp. 25-26).

The Petition for Writ filed on behalf of the Commission herein raises solely the issue of "retroactive refunds" (FPC Pet., p. 3), and indicates that the reasons for review are the same as those set forth in the Petition filed in Sunray DX Oil Co., *supra*,[7] to which the Commission refers the Court (FPC Pet., p. 6).

Likewise, the Petition for Writ filed by Long Island Lighting Company, et al., raises but this one issue and makes reference to its Petition filed in Case No. 62, October Term, 1967.

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[7] Case No. 60, October Term, 1967. References herein to the Petition for Writ filed on behalf of the Commission in *Sunray DX Oil Co., supra*, take the form "FPC Pet., No. 60, p.___."

REASONS FOR DENYING THE WRIT

The broad argument of the Commission seeks to impress upon the Court that the decision below is administratively infeasible, an unsupportable "limitation upon the discretion of the Commission" (FPC Pet., No. 60, p. 13). Essentially, Petitioner urges that the Commission must not be foreclosed from ordering retroactive refunds simply because of the lack of forewarning to the affected producers of their refund liability; the decision below, it is suggested, is too "inflexible" in enunciating a rule which requires unequivocal forewarning before collections may be treated as subject to refund. For reasons, the Commission urges review of the decision below on alleged grounds that (1) it is clearly wrong and inconsistent with principles expressed in earlier decisions of this Court; and (2) it presents a question of substantial importance and one respecting which the Circuits are in disagreement. Respondents, on the other hand, will show the Court that the broad assertions regarding both error and importance are wanting in merit, and that the Petitions should be denied for failure to demonstrate sufficient cause for granting review of the decision below.

1. *The Decision of the Court of Appeals is Clearly Correct And is Wholly Consistent with Opinions of this Court.*

A. The Commission itself considered, and rejected, the imposition of refund conditions on two separate occasions. It detemined in the first instance to issue temporary certificates without

any refund condition,[8] and, after it did in fact issue temporary certificate orders, these "no refund condition" temporary certificates were neither challenged nor modified by judicial review.[9] The producers relied upon the temporary certificates granted them, and committed their gas to interstate service. These temporary certificates may not now be retroactively rewritten by the device of imposing a "condition" on the permanent certificates, for such belated action would constitute entrapment and thereby eliminate the fundamental initial choice of the applicant to use or to sell his gas in another manner if the refund or other requirements of interstate regulation are deemed onerous.[10]

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[8] Temporary certificates, both of the "refund condition" and "no refund condition" types, as well as permanent certificates [see Ordering Paragraph (J); J.A. 307-308], contain language providing that the mere fact of issuance is without prejudice to future Commission action (*Cf.*, FPC Pet., p. 4). The evident purpose of such general, routine language is to signal that the Commission will not necessarily issue identical authority in the future, on a *prospective* basis, after hearing. The reason for such routine language thus has nothing to do with refunds or claimed refund obligations. See *Sunray DX Oil Co., supra*, 370 F. 2d at 193-194.

[9] In one instance, temporary certificates were *upheld*, as issued, on judicial review (see Note 2, *supra*).

[10] After deliveries of gas commence in interstate commerce, the producer is not free to use or to sell his gas production in other fashion. This result stems from Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), which requires a hearing and "permission and approval" of the Commission before abandonment of jurisdictional service may be had. Except for the independent ground of depletion of gas supply, an inescapable natural phenomenon, abandonment of jurisdictional service may be had under the Natural Gas Act only if "the present or future public convenience or necessity permit such abandonment," *Ibid.* The standard just cited may be met by the producer only with difficulty, if at all, after protracted hearings. *Cf.*, Pan American Petroleum Corporation, *et. al.*, Docket No. G-18704, *et al.*, Order Adopting Examiner's Decision, 25 FPC 1 (1961). As a practical matter, once deliveries of gas in interstate commerce are initiated, the gas involved will flow to the same destination until depletion occurs.

The principle of "free choice" was stated in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959), and was fully recognized and confirmed in the decision below. The Tenth Circuit, in *Sunray Mid-Continent Oil Company, supra*, held that the producer-applicant under Section 7 of the Act "has the free choice to accept or reject" a temporary certificate tendered by the Commission, and that he has the right:

> "... to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell you gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond'." (270 F. 2d at 409).

Accordingly, the Court, in *Sunray Mid-Continent Oil Company, supra*, ruled that the Commission was required to take action upon requests for temporary certificates "with such certainty as to allow the exercise of choice."

Here, the Commission would eliminate the choice which existed before the commitments to interstate commerce were made, by modifying, retroactively, the terms of the temporary certificates upon which the "choice" was made. Here, the Commission would now tell the producer that he cannot retain the collection which he (and all concerned) conceived were his by virtue of the "choice" he made. That the refund conditions here sought to be imposed by the Commission physically reside in permanent certificates cannot obscure their real meaning and

effect — these conditions undeniably relate to deliveries of gas occurring under temporary certificates, and these conditions, then, in every real sense *are* conditions on the temporary certificates.

Sunray Mid-Continent Oil Company, supra, which forbids the corruption of unfettered judgment in the matter of entering the regulated market, is eminently sound in principle and reason and unerringly points to the correctness of the decision below. The Petitions filed herein should thus be denied.

Moreover, entirely independent of the doctrine of "free choice," the decision below is clearly correct because the "no refund condition" temporary certificate orders of Respondents were not challenged on this ground within the time permitted for judicial review by Section 19(b) of the Natural Gas Act (*Cf.,* Note 2, *supra*). After the expiration of the statutory appeal period, these temporary certificates without refund condition may not be collaterally attacked or modified by the Commission in any manner, certainly not through the use of an *ex post facto* "condition" relating to sums collected under the temporary certificates. *Texaco Inc. v. Federal Power Commission,* 290 F. 2d 149, 156-157 (CA 5, 1961); *Pan American Petroleum Corporation v. Federal Power Commission,* 322 F. 2d 999, 1004 (CADC, 1963). The Petitions may thus be denied on independent, but equally sound, procedural grounds.

B. After the issuance of "no refund condition" temporary certificates and the commencement of deliveries of gas thereunder, Public Service Electric and Gas Company, Long Island Lighting

Company, and United Gas Improvement Company, filed a joint motion to impose refund conditions on these temporary certificates issued to Respondents."[11]

On February 5, 1963, without ambiguity or equivocation, the Commission affirmatively rejected the distributors' request. In the pertinent order, set out as Appendix A hereto, the Commission held:

> "Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. *This we will not do.* Assuming without deciding that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced the producers *to dedicate their gas to market upon one set of conditions, and then imposing more stringent conditions upon them.* Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company v. F.P.C.*, 270 F. 2d 404. *Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy*" (29 FPC at 225) (emphasis added).

Significantly, the Commission, while describing the nature of the temporary certificates before it, stated that "*The initial price*

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[11] Particular sales to Transcontinental Gas Pipe Line Corporation were covered by this motion, including the certificate dockets listed in Note 5, *supra.*

would, however, continue to be collected until a prospective price could be determined after hearing . . ." (29 FPC at 224) (emphasis added).[12]

In a radical departure from the unequivocal order of February 5, 1963, the Commission in Opinion No. 436, less than two years later, issued to Respondents permanent certificates providing for the future exercise of an asserted power to impose refund liabilities for gas sold during the time that the "no refund condition" temporary certificates were in effect.[13] Thus, by Ordering Paragraph (C) of Opinion 436 (J. A. 378), the Commission *temporarily deferred doing exactly what it had firmly said it would not do at all in its Order of February 5, 1963.*

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[12] The [redacted] in the consolidated proceedings below were thus reassured that refunds would not be exacted; however, this was not the sole occasion on which reassurances were provided the industry. For example, Joseph C. Swidler, while Chairman of the Commission, stated in an address given to the American Petroleum Institute on November 15, 1961, that temporary certificates without refund condition were intended to "authorize initial sales on a firm basis" so that "producers may know that all of the new initial price is theirs to keep . . ." Objectively, the foregoing statement and like reassurances must each be characterized as the direct opposite of a "forewarning" to producers that refunds would be exacted from them. Not surprisingly, the court below used the terms "unconscionable" and "hidden liability" in speaking of the plight foisted upon the "unwary producer," see Note 19, *infra.*

[13] Order No. 436 was also a radical departure in this respect from the earlier statement of the Commission General Counsel, who as late as July, 1963, on behalf of the Commission, assured the Court of Appeals for the District of Columbia Circuit that producers accepting temporary certificates without refund condition "would have had no reason to assume they might later be required to make refunds for the period that the temporary authorizations were in effect." Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission*, CADC Cause No. 17582, p. 29.

It is clear that the Commission's Order of February 5, 1963, was reviewable under Sections 19(a) and 19(b) of the Natural Gas Act, but the distributor-movants took no further steps to protect their asserted rights. Refer in this connection to *Cities Service Gas Company v. Federal Power Commission*, 255 F. 2d 860 (CA 10, 1958), *cert. den.*, 358 U.S. 837, in which it was held that:

> "An order of an administrative body is reviewable when action taken in advance of hearings or adjudication result in the setting of legal consequences, *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L.Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, *certiorari denied Japan-Atlantic and Gulf Conference v. United States*, 347 U.S. 990, 74 S. Ct. 852, 98 L.Ed. 1124 and cases cited therein" (255 F. 2d at 863).

The Commission's Order of February 5, 1963, had obvious "legal consequences," as well as an "impact upon rights"[14] claimed by the distributor-movants and also an "impact upon rights" asserted by Respondents. It plainly fixed a "legal relationship" within the contemplation of the cited authorities and operated, as well, to deny "rights" sought by the distributors. The Commission's Order of February 5, 1963, in short, was no mere "abstract declaration,"[15] but was an order entered on motion filed by the

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[14] In *Amerada Petroleum Corporation v. Federal Power Commission*, 285 F. 2d 737 (CA 10, 1960), it was stated that "To be reviewable, an order must have an impact upon rights . . ." (285 F. 2d at 739).

[15] *Cf., Pennsylvania Railroad Company v. United States*, 363 U.S. 202, 205 (1960).

distributor-movants and answers filed by Respondents. The Commission's order on the one hand absolutely rejected the distributors' request, and on the other hand, firmly and unequivocally ruled that Respondents had no refund liability for gas sold in reliance upon earlier orders granting temporary certificates.

In *Pan American Petroleum Corporation v. Federal Power Commission*, 322 F. 2d 999 (CADC, 1963), the Court, in discussing the period in which an agency may revise its own order, stated:

> "This Court has consistently held that an administrative agency retains jurisdiction to reconsider and correct its order until the time for judicial review has expired. *Enterprise Company v. Federal Communications Comm.*, 231 F. 2d 768 (1955), *cert. den.*, sub nom., *Beaumont Broadcasting Corp. v. Enterprise Company*, 351 U.S. 920 (1956)" (322 F. 2d at 1004).

The above holding is authority for the correlative principle that an agency is without power to change the substance of its own order after that order becomes final by reason of absence of appeal.[16]

Notwithstanding, however, the definitive language of the Order of February 5, 1963, the distributor-movants failed to appeal, and the time for seeking review under Sections 19(a)

[16] Compare *Texaco Inc. v. Federal Power Commission*, cited *supra*. The court there held that the failure of the petitioners to appeal F.P.C. orders granting temporary certificates burdened with indefinite refund conditions deprived the court of power to determine the lawfulness of those conditions (290 F. 2d at 157). In the instant case, the Commission declined to impose any refund conditions by its Order of February 5, 1963, and distributor-movants acquiesced in that determination by failing to appeal.

and 19(b) of the Natural Gas Act expired several times over. During the review period, the Commission was not impelled to recall or to revise its Order of February 5, 1963; in fact, it took steps to change its view in the administrative proceedings below only when Opinion No. 436 — the agency opinion below — was issued. As a consequence of inaction during the time for appeal, the Order of February 5, 1963, is final and is binding and may not now be impugned or attacked by any party or litigant, including the agency itself.

The final and binding nature of the Order of February 5, 1963, directly points to the correctness of the decision below.[11] Moreover, the related course of conduct, involving agency assurances, significantly repeated and strikingly illustrated by an unequivocal order of the Commission that retroactive refunds would not be exacted, furnishes supporting grounds, not without ethical import, for the denial of the Petitions filed herein.

C. The Commission would depict the issue as bearing upon its power to condition *permanent* certificates (FPC Pet., No. 60, pp. 10-11), but this argument is simply an effort to disguise the actual meaning and effect of what the Commission proposes to do, *i.e.*, to amend and condition final *temporary* certificates, retroactively. Fundamentally, then, this argument of the Commis-

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[11] It is submitted that the doctrine of finality here urged incontestably resolves the refund issue as to Respondents' sales mentioned in Note 5, *supra*, *i.e.*, this doctrine supplies an additional, compelling reason why, in all events, the Petitions should be denied as to sales concluded by the Order of February 5, 1963.

sion falls because it divests *temporary* certificates of the dignity and meaning which they, as final orders, unquestionably possess. See *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964), the *Hunt* case. If the Commission may, on permanent certification, retroactively modify the precedent temporary certificate or any of the conditions set out therein, it is obvious that the issuance of a temporary certificate involves mere ceremony, devoid of real, substantive meaning. Petitioners, under their view, would grant the Commission power to make a "no refund condition" temporary certificate more onerous than a temporary certificate with a specific refund condition.[11] Petitioners, under their view, would afford the Commission latitude to withdraw, change or modify the very conditions which, several years earlier, induced the dedication of gas to commerce. Without seeking to employ histronics, so to entrap a regulated natural gas company in this fashion is nothing short of shocking."[12]

The decision in *Hunt*, supra, makes clear that the Commission has authority, and in act is obligated, to protect consumers

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[11] This anomoly exists because of Petitioners' claim that "no refund condition" temporaries permit the Commission to order "floorless" refunds, *ie.*, down to whatever level may finally be found for the "in-line" price; contrariwise, of course, under a temporary bearing an express refund condition, Petitioners are bound to recognize that refunds may be ordered only in accordance with the exact refund condition contained therein, down to the price level stated — the refund "floor" in the condition — and no lower.

[12] The court below observed (FPC Pet., App. A, p. 27): "And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce."

during the pendency of temporary certificates by appropriate action taken at the time the temporary certificates are issued. In *Hunt*, the court spoke of the broad authority residing in the Commission relative to the issuance of temporary certificates under Section 7(e) of the Natural Gas Act; the court also stressed the importance and necessity of such authority being properly exercised. The court stated as follows:

> "... The Commission must have the authority to condition a temporary certificate so as to avoid *irreparable* injury to affected parties. *This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the ex parte nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued.*" (376 U.S. at p. 523) (emphasis added).

The Court in *Hunt, supra,* thus rebuts Petitioners' argument and shows that the exercise of administrative discretion and expertise in conditioning or in not conditioning temporary certificates *does* have significance. Otherwise, the Commission plainly does not need authority to condition a temporary certificate; otherwise, there can be no concern with *irreparable* injury. Indeed, if the Commission, at the later date of permanent certification, can retroactively modify valid temporary certificates, then such plenary authority renders the temporary certificates devoid of the meaning ascribed them in *Hunt*. Simply stated, Petitioners' argument falls of its own weight, for it cannot be reconciled with *Hunt*.

The holding of this Court in *Hunt, supra,* leads but to the reasoned conclusion that the decision below was correct. Indeed,

this Court's own earlier holding in *Hunt*, without more, compels the denial of the Petitions filed herein.

D. Contrary to the Commission's view (FPC Pet., No. 60, pp. 11-12), the decision below is fully consistent with this Court's holding in *United Gas Improvement Co., et al. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), the *Callery* case. In *Callery*, this Court held that the Commission could order refunds of sums collected during the judicial review of permanent certificates which were ultimately set aside; the crucial point of *Callery* was that the Commission could require refunds under certificates "which never became final" (382 U.S. at 299). Through judicial review of their permanent certificates, the producers in Callery were clearly on notice of possible modification of their non-final certificates.[20]

In the present case, as indicated *supra*, the "no refund condition" temporary certificate orders of Respondents became fixed and final. The Producers had no notice of possible modification of the initial temporary certificate orders. Rather, they were later reassured by the February 5, 1963, order of the Commission that there would *not* be any modification of their temporary certificates to provide for refunds; the Order of February 5, 1963,— an additional order affirmatively stating this for all to read— then itself became final.

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[20] Moreover, the Court in *Callery* indicated that the producers were explicitly told by the Commission that refunds would be required under their non-final certificates (382 U.S. at 226).

In sum, the matter of legal finality[21] removes this case from the *Callery* rule pertaining to permanent certificates subject to modification on appeal. Thus, the holding of this Court in *Callery* represents no challenge to the correctness of the decision below. Indeed, far from challenging the decision below, *Callery* actually reaffirms the principle that the Commission cannot make reparation orders[22] and, thus, supports the holding below. The Petitions filed herein, then, should in all things be denied.

2. *The Issue Presented is Not of Sufficient Importance to Warrant Intervention by this Court.*

Petitioners state that the ruling below presents an important question in the administration of the Natural Gas Act. In support, Petitioners indicate that there are many other temporary certificates in regard to which the point here at issue may arise.

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[21] The finality of temporary certificates cannot be discredited by Petitioners, as they would seek to do, on the basis of *ex parte* issuance. Temporary certificates, although issued *ex parte*, are of public record and available for inspection in the Commission's public reference room. Indeed, the Commission's own regulations so require; see 18 C.F.R. 1.36(c)(6). In practice, the issuance of temporary certificate orders is carefully noted by distributor and consumer interests and they undertake to intervene with assiduous regularity; not infrequently, the intervenors choose to apply for rehearing of these orders under Section 19(a) of the Natural Gas Act and then, in some instances, to appeal them to court under Section 19(b) of the Act. In this connection, it should be observed that particular intervenors had notice of, and in fact appealed, temporary certificate orders involved in this very case; refer to the decision cited in Note 2, *supra*.

[22] 382 U.S. at 229. Reparations are exactly what Petitioners are seeking: refunds under lawful orders which even today are inviolate and unimpeached. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); and *T.I.M.E. v. United States*, 359 U.S. 464, 469-470 (1959).

The potential refund liability, however, cannot be estimated by Petitioners, but Petitioners assert that "it is undoubtedly large."

From the numerical standpoint, it is understood that the Commission intended to cite, as an estimate, but 479 existing temporary certificates "in which the identical issue may arise" (FPC Pet., No. 60, p. 8). In all events, the hypothetical question posed in the Petitions has greatly declined in importance, for it is our understanding that the vast majority of those 479 temporary certificates prescribe prices at or below the current "in-line" price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed "in-line" prices.

Additionally, we are advised that the Commission's work-papers indicate that, since the middle of 1964, the Commission has followed the policy of inserting *express* refund conditions in temporary certificates authorizing sales at prices higher than those prescribed in previously determined "in-line" certificate proceedings.

Moreover, in all events, it is clear that the Commission has unquestionably eliminated the ruling below with respect to all new temporary certificates, since it now requires the inclusion of *express* refund conditions pursuant to Commission general

order.[23] The issue before the Court, then, will not arise in temporary certificates hereafter issued.

It can thus hardly be disputed that the "retroactive refund" issue relates to a finite, limited number of temporary certificates[24] for a limited period of refund liability.[25] Surely, the issue does not assume the stature of a recurring problem broadly posing obstacles to the administration of the Act, for, indeed, the entire "in-line" concept is but an interim procedure pending the establishment of area rate levels by the Commission. Certainly, at most, the issue relates only to a limited number of sales awaiting permanent certification, and, as to those sales, only the locked-in period preceding permanent certification is affected by the resolution of the subject issue. The issue is not present for deliveries of gas made after the date of permanent certification, for each temporary certificate at that time is replaced by a permanent certificate to govern sales prospectively. See *Hunt, supra.*

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[23] Order No. 336, Docket No. R-316, issued February 9, 1967. This order is set out in full as Appendix B to "Brief of Respondent Standard Oil Company of Texas in Opposition," Case No. 80, October Term, 1967.

[24] Sales concluded by the Order of February 5, 1963 (see Note 5 *supra*) are, of course, much fewer in number than the total temporary certificates issued without refund condition. Even when considered in connection with sales similarly affected by a like order of the same date in *Sunray DX Oil Co., supra,* Case No. 60, October Term, 1967, such sales are so numerically limited that the broad, general issue put by Petitioners cannot exist in the context of sales tested by these orders.

[25] In the instant case, the potential refund period runs from the date of initial deliveries (when the producer's choice became irrevocable by virtue of dedication to market), to July 23, 1964, when permanent certificates were issued. Prospectively, the "in-line" prices derived for Respondents' dockets relate to the period running from such date of permanent certification to the date of establishment of area rate levels.

The Commission's reference to potential refund liability under outstanding temporary certificates is speculative and inexact.[26] In this connection, the Commission is yet to be finally upheld in ordering specific refunds of amounts collected under unconditioned temporary certificates. Therefore, even assuming *arguendo* the existence of power in the Commission to order retroactive refunds, generally, there can be no meaningful measure of the amounts involved, because definitive guidelines or standards respecting the *exercise* of that power have not evolved.

Particularly in view of the limited number of temporary certificates affected, the fact that only a locked-in period preceding permanent certification is involved, and the unquestioned elimination of the issue in the future, it is clear that the question posed by Petitioners is not of sufficient importance to warrant intervention and consideration by this Court. Nor does potential refund liability under other temporary certificates enhance the importance of Petitioners' question, which, as indicated, cannot be meaningfully measured in terms of the amounts involved.

The Petitions, in sum, fail to exhibit an issue of importance which compels or requires resolution, and this Court, perforce, should deny the Petitions for that independent reason.

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[26] In any case, the refund situation involving dockets affected by the Order of February 5, 1963, must be distinguished from other cases involving temporary certificates issued by the Commission without refund condition. In the instance of the former sales, the Commission did not simply fail to impose specific refund conditions (FPC Pet., No. 60, pp. 8-9). Rather, the Commission affirmatively declared in unequivocal language that refunds would not be ordered. Thus, the broad, general issue stated by Petitioners is not present in the case of sales concluded by the Order of February 5, 1963.

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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August 4, 1967

APPENDIX A

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

AREA RATE PROCEEDING; ET AL., DOCKET NO. AR61-2, ET AL.; AMERADA PETROLEUM CORPORTION, DOCKET NO. C160-688; UNION TEXAS PETROLEUM — DIVISION OF ALLIED CHEMICAL CORPORATION, DOCKET NO. C161-1411; THE BRITISH-AMERICAN OIL PRODUCING COMPANY, DOCKET NO. G-18963; FOREST OIL CORPORATION, DOCKET NO. C161-248; GENERAL AMERICAN OIL COMPANY OF TEXAS, DOCKET NO. C161-182; HASSIE HUNT TRUST, DOCKET NO. G-18897; C. H. LYONS, SR., DOCKET NO. C160-329; OCEAN DRILLING & EXPLORATION CO., DOCKET NO. C160-743; PAN AMERICAN PETROLEUM CORPORATION, DOCKET NO. G-16946; PAN AMERICAN PETROLEUM CORPORATION, DOCKET NO. G-19223; PAN AMERICAN PETROLEUM CORPORATION, DOCKET NO. C161-355; PERRY R. BASS (FORMERLY RICHARDSON & BASS), DOCKET NO. C161-714; REUBEN W. MAYRONNE, JR., D/B/A RIVERSIDE OIL COMPANY, DOCKET NO. G-20182; J. C. TRAHAN DRILLING CONTRACTORS (FORMERLY SHALLOW OIL COMPANY, INC.), DOCKET NO. C160-698; SOUTHWEST GAS PRODUCING COMPANY, INC., DOCKET NO. G-20046; TRICE PRODUCTION COMPANY, DOCKET NO. C160-17; TEXACO INC. (FORMERLY THE TXL OIL CORPORATION), DOCKET NO. C161-969; UNION OIL COMPANY OF CALIFORNIA, DOCKET NO. C161-331; UNION PRODUCING COMPANY, DOCKET NO. C161-1111; U.S. OIL OF LOUISIANA, INC., DOCKET NO. C161-144; ATLANTIC REFINING COMPANY, DOCKET NO. C161-450; PAN AMERICAN PETROLEUM CORPORA-

TION, DOCKET NO. C161-808; HARVEY PELTIER, DOCKET NO. C160-505; SOCONY MOBIL OIL COMPANY, INC., DOCKET NO. G-18461

Order Denying Motion To Impose Price Conditions In Temporary Certificates
(Issued February 5, 1963)

(29 FPC 223)

On December 12, 1962, Public Service Electric and Gas Company, Long Island Lighting Company and United Gas Company (Movants) filed a motion to impose price conditions in temporary certificates heretofore issued to the independent producers in the above listed dockets.[1] Responses to the motion were filed by Transcontinental Gas Pipe Line Corporation (Transco) and 15 independent producers.

The producers listed above have each been granted temporary authority to make sales to Transco. In each instance the authority was granted without condition as to refund to a price below that at which the sales would be initiated.

(29 FPC 224)

The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. The contracts were entered into during the years

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[1] The matters listed above which were previously consolidated with the Area Rate Proceeding, Docket No. AR61-2 were severed therefrom by order of the Commission issued December 31, 1962; in *Union Texas Petroleum, et al.*, Docket No. G-13221, *et al.* The above-listed producers were consolidated with that case by that order. The motion herein was directed to the individual dockets, however, and will be treated accordingly, except *Union Texas Petroleum,* Docket No. C161-1411, which was dismissed and cancelled by Order issued September 14, 1962, and *Amerada Petroleum Corporation,* Docket No. C160-688, which is the subject of a settlement agreement and was severed from the proceedings in Docket No. G-13221, et al, by Order issued February 1, 1963, p. 204, *supra.*

1958 through 1960; the temporary authorizations were issued from 1958 through January 12, 1961.

Sales of gas were commenced by each of the producers pursuant to the temporary authority. Movants have requested the Commission to either (1) terminate the existing temporary authorizations and concurrently issue temporary authorizations containing conditions which would make the sales subject to refund at a lower price, or (2) in the alternative, to amend the existing temporary certificates by imposing price conditions in order to provide for appropriate refund from the date of the Commission's order. Movants indicate in addition that "where appropriate, the Commission should provide an opportunity for the applicants to reject the conditioned proffered certificate."

Essentially the motion constitutes an application for rehearing of the Commission's Letter Orders issuing temporary authorization to the above-listed producers. Section 19(a) of the Natural Gas Act provides that an application for rehearing must be submitted within 30 days following the issuance of an order. The motion herein was not submitted within the statutory 30-day period following the issuance of the temporary authorization. There is no question that such temporary authorizations constitute appealable orders and, therefore, rehearing should be sought within 30 days. However, we recognize that the letter orders issuing the authorizations were unreported, although copies thereof were available to the public. We shall not, therefore, dismiss the motion as being untimely. However, for the reasons hereinafter set forth, we must deny the motion to terminate the existing temporary authorizations.

Section 7(c) of the Natural Gas Act empowers the Commission to issue temporary certificates when emergency situations exist. We have promulgated regulations recognizing certain situations which constitute emergency situations as to independent producers. See Regulations under the Natural Gas Act, Section

157.28.[2] Each of the above-listed producers requested the issuance of temporary authorization to sell gas and set forth an emergency situation which, under our regulations, permitted the issuance of such authority. Temporary certificates were therefore issued. Movants would now have us withdraw the existing authority and proffer to each producer a new temporary certificate conditioned to meet the requested requirements, giving each producer the opportunity to reject such temporary authority. Movants ignore the fact that the producers and pipe line here involved have already acted upon the temporary authority as issued and have undoubtedly expended considerable funds in justifiable reliance thereon and, in the case of the pipe line, Transco, has become dependent upon this source of supply, in part, to meet its market requirements. To now offer the producers an opportunity to reject a substituted temporary certificate, conditioned to provide for refunds down to the price to be fixed after the Section 7 hearing we have ordered, would clearly be contrary to the public interest. It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas.

(29 FPC 225)

Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. This we will not do. Assuming, without deciding, that we have authority to impose

[2] Also see Order denying applications of New York Commission for rehearing and reconsideration and motion for a stay issued December 31, 1962, in *J. Ray McDermott, et al.*, Docket No. C163-301, *et. al.*

such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with "such certainty as to allow the exercise of choice upon (the producer's) part." *Sunray Mid-Continent Oil Company v. F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy.

While this case relates to the imposition of refund conditions in temporary authorizations already issued, we do not wish our determination here to be construed as indicating that we will normally impose such a condition if the applications for temporary authority were before us for the first time. On the contrary, as we made clear in our order in *J. Ray McDermott, supra*, in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate. Our policy in this respect was clearly set forth in the Fourth Amendment to our Statement of General Policy No. 61-1 in which we reduced the Southern Louisiana ceiling and observed that the Commission's

iterim ceilings represent the Commission's judgment of a ceiling which "will enable the Commission to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas."

We recognize that at the time the motion was made it appeared that considerable time would lapse before the applications herein would be heard and disposed of. However, since that time, we have consolidated for hearing the above-listed cases as well as most of the other certificate applications now pending for the sale of gas in Southern Louisiana.[4] We anticipate that a final disposition in that proceeding will be forthcoming in the not too far-distant future. A decision therein would dispose of the above-listed applications.

The Commission orders:

The Motion of Public Service Electric and Gas Company, Long Island Lighting Company and the United Gas Improvement Company to impose price conditions in temporary certificates is hereby denied.

Commissioners Morgan and Ross *concurring* for the reasons set forth in their respective concurring statements to the order issued February 5, 1963, in Docket No. C162-1544, *et al, Amerada Petroleum Corporation, et al.*, p. 218, supra, to the extent applicable to this order.

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[4] *Union Texas Petroleum, et al.*, Docket No. G-13221, *et al., supra*, footnote 1.

APPENDIX B

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows.

Section 7(b), 15 U.S.C. 717f(b):

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under the rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * * .

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Section 19(a), 15 U.S.C. 717r(a):

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. * * * No proceeding to review any order of the Commission shall be brought by

any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

Section 19(b), 15 U.S.C. 717r(b):

Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. * * *

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

FEDERAL POWER COMM'N *v.* PAN AMERICAN PETROLEUM CORPORATION ET AL.; and

LONG ISLAND LIGHTING CO. ET AL. *v.* PAN AMERICAN PETROLEUM CORPORATION ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Nos. 227 and 415. Decided May 20, 1968.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgments are vacated. The cases are remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U. S. —.

MR. JUSTICE MARSHALL took not part in the consideration or decision of these cases.